

2. The location of the on-site replacement units should be expanded to include replacing units in the neighborhood and should anticipate that more than one-third of the residents may want to return to the former site or neighborhood.
3. The requirement that replacement units must be built within the jurisdiction of the public housing agency and in areas having a low concentration of poverty should be changed to provide that units built outside the original site should be provided in a manner that furthers economic and educational opportunities for residents.
4. Temporary relocation and multiple moves should be minimized or indeed prevented by making off-site replacement housing available prior to any relocation of residents.
5. Replacement units should maintain essential rights of applicants, including but not limited to:
  - a. Rents must be set at 30% of a family's adjusted income.
  - b. Public housing agencies (PHAs) must target at least 40% of new admissions to applicants with incomes at or below 30% of Area Median Income (AMI). If the housing is project-based vouchers, PHAs must target at least 75% of new admissions to applicants with incomes at or below 30% of AMI.
  - c. Victims of domestic violence cannot be discriminated against.
  - d. Applicants may designate an alternate contact person or entity who can speak to the PHA on their behalf.
  - e. Applicants who are denied housing must receive a review before a hearing officer who did not make the original determination and is not subordinate to the person who did.
6. The replacement units should have the same number of bedrooms as those slated for disposition and demolition, unless a market analysis shows a need for units with a greater number of bedrooms.
7. Mobility counseling must be available to displaced residents who wish to voluntarily move to low-poverty and non-racially concentrated neighborhoods throughout the metropolitan area. Mobility programs shall include:
  - a. one-on-one housing counseling, search assistance and post-move counseling;
  - b. active landlord recruitment incentives;
  - c. use of exception rents;

- d. community tours and comprehensive community introductions on local schools, shopping, transportation, religious and health resources;
- e. credit repair and other training/education sessions. ■

## Improved Section 3 Enforcement by HUD at Work in St. Paul\*

In 2009, as part of a plan to increase employment and training opportunities for low-income individuals, the Department of Housing and Urban Development (HUD) began to more aggressively enforce Section 3 reporting requirements under form HUD-60002.<sup>1</sup> The form requires recipients of HUD funds to report annually on their compliance with Section 3, but before this past year, HUD did little to ensure that recipients submitted the form.<sup>2</sup> HUD's enforcement campaign has led to an increase in the number of state and local agencies that complied with their Section 3 reporting requirements.<sup>3</sup> To date, 75% of HUD-funded state and local agencies have submitted form HUD-60002.<sup>4</sup> This is the highest response rate since HUD first made the reporting mandatory.<sup>5</sup> Should a state or local agency fail to submit the annual report, HUD may investigate the non-compliance and eventually withhold federal funds.

HUD also illustrated its improved commitment to enforcing Section 3 by investigating claims that the city of Saint Paul had failed to maintain a written or unwritten Section 3 plan and failing to file form HUD-60002.<sup>6</sup> Specifically, the May 2009 compliance review found that the city lacked defined procedures to notify Section 3 residents about related training and employment opportunities, to notify Section 3 business concerns about related contracting opportunities, and to notify potential contractors about Section 3 requirements. HUD also found that the city lacked procedures to incorporate the Section 3 clause into solicitations and contracts and to document

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<sup>1</sup>Press Release, HUD, HUD Steps up Enforcement of Job Creation Efforts for State and Local Governments (Mar. 8, 2010).

<sup>2</sup>For an in-depth analysis of this issue and discussion of Section 3 generally, see NHLP, *Recent Developments Show Promise for Enforcing Section 3*, 39 HOUS. L. BULL. 275, 289 (Nov.-Dec. 2009).

<sup>3</sup>Press Release, *supra* note 1.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*; see also 24 C.F.R. § 135.90 (2010) (effective June 30, 1994).

<sup>6</sup>Voluntary Compliance Agreement, Section 3 of the Housing and Community Development Act, HUD-St. Paul, MN, at 4, Feb. 2, 2010.

actions taken to comply with Section 3 requirements.<sup>7</sup> The penalties for lack of compliance can be steep. Here, HUD withheld \$18 million in Neighborhood Stabilization Program funds due to noncompliance.<sup>8</sup>

As a result of the findings, HUD and the city entered into a Voluntary Compliance Agreement that sets forth the steps that the city will take to address these deficiencies.<sup>9</sup> The agreement is noteworthy as an example of measures HUD may take in the future for other cities or agencies found to be noncompliant with Section 3.

## The Scope of the Agreement

The agreement applies to HUD community development assistance received by the city that is used for housing rehabilitation, housing construction and other public construction.<sup>10</sup> Community development assistance includes Community Development Block Grant funds, HOME funds, Emergency Shelter Grant funds, Neighborhood Stabilization Program funds, and Housing for Persons with AIDS funds, among others.<sup>11</sup> The agreement applies to recipients of funds for a Section 3 project in which the amount of the assistance exceeds \$200,000.<sup>12</sup> In addition, the agreement applies to both contractors and sub-contractors working on Section 3 covered projects that receive over \$200,000 in community development assistance if the contract or sub-contract exceeds \$100,000.<sup>13</sup>

## Specific Provisions of the Agreement

Under the agreement, the city must comply with all relevant regulations, as well as a number of other requirements which the city must meet at various intervals throughout the agreement's four-year term. Within 60 days of the effective date of the agreement, the city must:

- hire or appoint appropriate personnel to oversee compliance with the terms of the agreement and provide HUD the names of such personnel;
- establish policies and procedures to enforce Section 3 and seek HUD approval of such; and
- place \$650,000 into a fund for the various Section 3 initiatives detailed in the agreement for the first two years of the agreement's term.<sup>14</sup>

<sup>7</sup>*Id.*

<sup>8</sup>See Ann Pratt, *Faith Leaders Want St. Paul to Pay for Its Sins*, MINN-SPOKESMAN REP., Feb. 16, 2010, <http://www.spokesman-recorder.com/news/article/article.asp?NewsID=101378&sID=4&ItemSource=L>; see also Chris Havens, *St. Paul, HUD, Settle Over Hiring, Outreach*, STAR TRIB., Feb. 3, 2010, <http://www.startribune.com/local/stpaul/83504242.html?elr=KArksUUUoDEy3LGDiO7aiU>.

<sup>9</sup>Voluntary Compliance Agreement, *supra* note 6, at 5.

<sup>10</sup>*Id.* at 9.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*; see also 24 C.F.R. § 135.3(a)(3)(ii)(A) (2009).

<sup>13</sup>Voluntary Compliance Agreement, *supra* note 6, at 9; see also 24 C.F.R. § 135.3(a)(3)(ii)(B) (2009).

<sup>14</sup>Voluntary Compliance Agreement, *supra* note 6, at 10.

## What the Agreement Does Not Do

The Agreement does not release the city from any claims arising under the False Claims Act.<sup>15</sup> However, the Agreement does not create any right in a third party to enforce any of its provisions, or to assert any claim against the city or HUD.<sup>16</sup> In addition, the agreement does not provide any specific relief to Frederick Newell, a local business owner who filed two administrative complaints with HUD alleging that the city of St. Paul and its Housing and Redevelopment Authority (HRA) failed to comply with Section 3. These administrative complaints precipitated the HUD compliance review.<sup>17</sup> The agreement specifically states that it "will and hereby does fully and finally resolve Mr. Newell's pending Section 3 administrative complaints against the City and the St. Paul HRA without further action."<sup>18</sup> Unfortunately, HUD's failure to provide any relief to Mr. Newell may discourage other parties from filing complaints with HUD.

## Provisions in Place to Aid the Agreement's Success

### Quotas and Identification of Appropriate Parties

Within 60 days of the effective date of the agreement, the city must develop and seek HUD's approval on a written Section 3 plan addressing contracting, employment and training opportunities. The city must establish a mechanism to ensure to the extent feasible that at least 10% of the total amount of Section 3 contracts for building in connection with housing rehabilitation and construction or other public construction be awarded to Section 3 business concerns.<sup>19</sup> Likewise, the city must establish a mechanism to ensure that at least 3% of all other Section 3 covered contracts be awarded to Section 3 business concerns.<sup>20</sup> To aid this endeavor, the agreement also requires the city to establish a process to certify Section 3 residents and business concerns.<sup>21</sup>

### Monitoring and Compliance

Importantly, HUD has established some concrete provisions regarding how compliance with the agreement

<sup>15</sup>*Id.* at 5; 31 U.S.C. §§ 3729-3733 (2009).

<sup>16</sup>Voluntary Compliance Agreement, *supra* note 6, at 9.

<sup>17</sup>Letter from Barbara M. Knox, HUD Office of Fair Housing & Equal Opportunity, to Chris Coleman, Mayor of St. Paul 2 (Aug. 25, 2009); see also NHLP, *supra* note 2, for a discussion of the Section 3 monitoring and limited compliance review for the City of St. Paul and the determination of noncompliance.

<sup>18</sup>Voluntary Compliance Agreement, *supra* note 6, at 5. Mr. Newell, in a class action involving three companies owned partially by him, also brought suit against the City of Saint Paul, and likewise received no relief there as the Court ruled that the plaintiffs lacked standing. See *Nails Constr. Co. v. City of St. Paul*, 2007 WL 423187 (D. Minn. Feb. 6, 2007).

<sup>19</sup>Voluntary Compliance Agreement, *supra* note 6, at 11; see also 24 C.F.R. § 135.30(c)(1) (2009).

<sup>20</sup>Voluntary Compliance Agreement, *supra* note 6, at 11; see also 24 C.F.R. § 135.30(c)(2) (2009).

<sup>21</sup>Voluntary Compliance Agreement, *supra* note 6, at 11-12.

will be assured and what penalties the city may incur for noncompliance. For example, the agreement states that HUD will monitor the city's implementation and will be given access to the city's premises, records and personnel for this purpose.<sup>22</sup> In addition, should any acts or omissions by the city and its representatives violate the terms of the agreement, HUD may then seek specific performance and/or enforce the provisions of the agreement in federal court.<sup>23</sup> Also, should HUD determine after 24 months of the effective date of the agreement that the city is unwilling or unable to comply with the requirements of Section 3 and the agreement, HUD may require the city to employ the services of a consultant or contractor to perform these duties on the city's behalf.<sup>24</sup> Finally, the agreement stipulates that the city must not only submit the HUD-60002 form annually as required by law, but must also submit semi-annual reports to HUD detailing the activities it has undertaken pursuant to the Agreement.<sup>25</sup>

### Transparency

The agreement also provides for greater transparency in several ways. First, a copy of the agreement must be made available to any person for his/her review pursuant to the Freedom of Information Act or any other law.<sup>26</sup> Second, within 180 days of the execution of the agreement, the city must provide notice of upcoming contracting opportunities on its website, on the Contract Analysis Services bulletin board, and directly to the city's certified Section 3 business concerns.<sup>27</sup> In addition, the city must annually provide Section 3 training events for contractors, sub-contractors, grantees, sub-recipients and residents.<sup>28</sup>

### Conclusion

HUD's agreement with the city of Saint Paul takes important steps towards remedying the city's noncompliance with Section 3 and may serve as a watermark as to what future agreements with other cities could entail. The agreement takes significant steps to enhance transparency by increasing the reporting requirements in both frequency and depth. It also aims to create accountability by giving HUD access to the city's records, requiring the city to appoint an individual to oversee compliance, and allowing HUD to require the city to hire an outside contractor to aid the implementation of the agreement should HUD find compliance lacking. In the event that similar agreements are made with other cities, HUD could further increase transparency by making all reports that the cities provide to HUD available to the public and by announcing major steps that the cities take to correct

noncompliance.<sup>29</sup> In addition, HUD should post all compliance agreements and determinations of noncompliance on its website. Posting such agreements, assuming that they are favorable to the beneficiaries of Section 3, would help advocates secure local compliance with Section 3. ■

<sup>29</sup>See NHLP, *supra* note 2, at 291.

## Highway Funds Could Be Subject to Section 3 Requirements

The Department of Transportation (DOT) recently published a notice seeking comments on a proposal to create an experimental project which would allow states to use Community Development Block Grant (CDBG) funds with their Federal Highway Administration Funds.<sup>1</sup> This would trigger requirements under Section 3 of the Housing and Urban Development Act to provide geographic and income-based preferences in hiring and contracting. The proposal seeks to implement the federal government's efforts to coordinate DOT, Department of Housing and Urban Development (HUD) and Environmental Protection Agency (EPA) policies to create sustainable and livable communities.

The National Housing Law Project (NHLP) and the National Low Income Housing Coalition (NLIHC) submitted comments on the DOT notice.<sup>2</sup> The comments focused on the interface between HUD and DOT policies and practices, with an emphasis on the implications for the CDBG program and Section 3. NHLP and NLIHC generally supported the proposal, but asked that the CDBG program's primary objectives be preserved, including developing viable urban communities, providing decent housing and a suitable living environment, and expanding economic opportunities for persons of low and moderate. The comments also urged that the experimental project advance Section 3's purpose of creating employment and other economic opportunities for low- and very low-income individuals. ■

<sup>1</sup>Livability Initiative under Special Experimental Project No. 14, 75 Fed. Reg. 15,767 (March 30, 2010).

<sup>2</sup>The comments, which were submitted May 14, 2010, are available on NHLP's homepage at <http://www.nhlp.org/>. They will be archived at NHLP's Attorney/Advocate Resource Center webpage on Section 3, <http://nhlp.org/resourcecenter?tid=115>.

<sup>22</sup>*Id.* at 10.

<sup>23</sup>*Id.* at 17.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 16.

<sup>26</sup>*Id.* at 9.

<sup>27</sup>*Id.* at 13.

<sup>28</sup>*Id.* at 12.