



U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT
Midwest Regional Office, Region V
Ralph H. Metcalfe Federal Building
77 West Jackson Boulevard – Room 2101
Chicago, Illinois 60604-3507

Office of Fair Housing and Equal Opportunity

FYI

August 25, 2009

Honorable Chris Coleman
Mayor of Saint Paul
390 City Hall
15 West Fourth Street
Saint Paul, MN 55102

Dear Mayor Coleman:

SUBJECT: Section 3 Monitoring and Limited Compliance Review
City of Saint Paul and the Housing and Redevelopment Authority (HRA)
Determination of Non-Compliance

The U.S. Department of Housing and Urban Development (HUD), Office of Fair Housing and Equal Opportunity, has completed a limited on-site compliance review of the city of Saint Paul and the Saint Paul Housing and Redevelopment Authority (HRA)¹ pursuant to Section 3 of the Housing and Urban Development Act of 1968². The purpose of the review was to determine whether, and to what extent, the city of Saint Paul and the HRA were administering HUD-funded programs in compliance with the requirements of Section 3 as specified in 24 CFR § 135. The review was limited to Section 3 contracting requirements and therefore the findings contained herein do not address the city's compliance with the Section 3 training and employment requirements.

The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed to low and very low-income persons. Section 3 applies to training, employment, contracting and other economic opportunities arising in connection with the expenditure of community development assistance. Most HUD programs require the grantee to sign a certification stating that it will comply with the requirements of Section 3.

Background:

The city of Saint Paul is a Community Development Block Grant (CDBG) entitlement

¹ The Saint Paul Housing and Redevelopment Authority is a legally distinct public entity which undertakes housing, commercial and business development activities on behalf of the City of Saint Paul. The Saint Paul City Council serves as the HRA Board of Commissioners.

² 12 USC 1701a.

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community and a HOME program participating jurisdiction. As such it is a recipient of HUD financial assistance. Certain projects carried out by the city utilizing HUD funds constitute "Section 3 covered assistance" as defined in 24 CFR 135.3.³ Between 2006 and 2008, the city received HUD funds in the following amounts:

2006 ⁴	CDBG \$8,211,748	HOME \$2,291,390
2007 ⁵	CDBG \$8,225,675	HOME \$2,277,962
2008 ⁶	CDBG \$7,941,344	HOME \$2,202,555

On June 23, 2008, Fredrick Newell filed a complaint alleging that the Saint Paul HRA failed or refused to comply with the requirements of Section 3. On June 24, 2008, Mr. Newell filed a second complaint alleging that the city of Saint Paul failed or refused to comply with the requirements of Section 3. Given the functional relationship between the HRA and the city of Saint Paul, the two complaints were consolidated for the purposes of investigation.

During the course of the investigation, HUD staff discovered that the city of Saint Paul had not submitted annual reports (HUD Form 60002) of Section 3 activity as required by 24 CFR 135.90⁷ for the last several years. In light of Saint Paul's failure to submit the annual reports as required, HUD determined to incorporate the investigation of Mr. Newell's complaints into a general review of the city of Saint Paul's compliance with the contracting provisions of Section 3.⁸

During the week of May 19, 2009, the following staff conducted a limited review of the city's compliance with Section 3, focusing on contracting opportunities and obligations: Jaime Pedraza, Erika Finkler and Lerdine Darden of the HUD Minneapolis Field Office, and Rafiq Munir of HUD's Section 3 Headquarters office. Data and documents were examined in advance of the on-site review. Key staff were interviewed and selected construction project files were reviewed on-site. Peter McCall, Assistant City Attorney, was present during the entrance and exit meetings and at all staff interviews.

In addition, materials produced pursuant to a federal lawsuit⁹ filed by Mr. Newell against the city of Saint Paul were also reviewed. In his lawsuit, Mr. Newell alleged the city failed to comply with Section 3 in numerous ways including (1) failure to award a sufficient percentage of contracts to Section 3 business concerns; (2) failure to exercise

³Section 3 applies to the following HUD assistance...community development assistance that is used for the following projects (i) housing rehabilitation (ii)housing construction and (iii) other public construction.

⁴ See <http://www.hud.gov/offices/cpd/about/budget/budget06>

⁵ See <http://www.hud.gov/offices/cpd/about/budget/budget07>

⁶ See <http://www.hud.gov/offices/cpd/about/budget/budget08>

⁷ Each recipient which receives directly from HUD financial assistance that is subject to the requirements of this part shall submit to the Assistant Secretary an annual report in such form and with and with such information as the Assistant Secretary may request, for the purposes of determining the effectiveness of Section 3.

⁸ See 24 CFR 135.74 (f).

⁹ Nails Construction Company et al v. The City of Saint Paul 2007 WL 423187 (D.Minn.)

oversight over contractors hired with Section 3 funds to assure that the contractors provide training, employment, and contracting opportunities to Section 3 persons and business concerns; (3) failure to meet Section 3's reporting requirements; (4) failure to seek out and identify Section 3 business concerns about contracting opportunities; and, (5) failure to file form HUD-60002. These are essentially the same allegations contained in Mr. Newell's HUD complaint. The lawsuit was ultimately dismissed on summary judgment because the court determined that Section 3 does not provide a right of private action.

Interviews:

HUD staff conducted interviews to determine the extent of knowledge city staff had of Section 3. From these interviews it was apparent that the staff had no working knowledge of Section 3 and was generally unaware of the city's programmatic obligations thereto. It appeared that city staff were confusing Section 3 responsibilities with Saint Paul's efforts to increase participation by minority and women-owned businesses in city contracts. Project managers and grants administrators in the city's Department of Planning and Economic Development (PED) testified that potential contractors are not notified of their Section 3 obligations nor do bid solicitations or contracts reference or incorporate the required "Section 3 clause."¹⁰ Further, they stated that an explanation of Section 3 requirements is not included in pre-bid or pre-construction conferences. Although such conferences are routine and project managers review various contract compliance issues during the conferences, they acknowledged that Section 3 is not one of the matters regularly discussed. Mr. McCall stated that his office works with PED staff to develop contracts using CDBG and HOME funds but that he has never advised that the Section 3 clause be incorporated into said contracts.

HUD requires CDBG entitlement communities to submit an annual report to determine the effectiveness of Section 3. The annual report is to be electronically submitted on Form 60002 with or at the same time the entitlement community submits its Consolidated Annual Performance and Evaluation Report (CAPER). City staff stated that they were unaware of this requirement and that, to their knowledge, the city has never submitted a Section 3 report to HUD.

Ronald Ross, PED Grants Administrator, stated that the city does submit the required Contract and Subcontract Activity Report to HUD annually.¹¹ This report is submitted pursuant to Executive Order 2516 which requires that all federal agencies develop Minority Business Development Plans. Form 2516 is designed to provide HUD with sufficient information to evaluate a grantee's performance towards meeting its Minority Business Enterprise (MBE) goals. While Form 2516 does include a field for reporting on Section 3 contract activity, filing Form 2516 does not obviate the recipient's obligation

¹⁰ 24 CFR 135.32 Each recipient has the responsibility to comply with Section 3 in its own operations, and ensure compliance in the operations of its contractors and sub-contractors. This responsibility includes...notifying potential contractors for Section 3 covered projects of the requirements of this part, and incorporating the Section 3 clause ... in all solicitations and contracts.

¹¹ HUD Form 2516 Contract and Subcontract Activity

to file Form 60002.

Form 2516 was not designed to fully capture a recipient's Section 3 contracting activities. However, even if it were, the city's method of data collection would have rendered its efforts in this regard as insufficient. This is demonstrated by a review of the Forms 2516 submitted by the city for 2005, 2006 and 2007. In project reports for each of the three years, there are numerous instances where a contractor is identified as Section 3 business in one report but not in another. When asked about this discrepancy, Mr. Ross stated that when filling out Form 2516 he relies exclusively upon information provided to him by the city's various sub-recipients. He said that upon receipt of said information he enters it onto a Form 2516 which he then transmits to HUD annually. Consequently in those instances where a sub-recipient working on a project asserts that a given contractor is a Section 3 business and another sub-recipient working on a different project does not so certify, the city simply forwards the contradictory information to HUD. Further, as Mr. Ross acknowledged, the city does not have a procedure in place for certifying Section 3 businesses. Therefore there is no mechanism by which the city could have independently evaluated a sub-recipient's assertion concerning a business's Section 3 status.

File review:

Based on information gathered before the on-site review, five community development projects were selected for review¹². The projects were selected because, per the recipient, they met the Section 3 funding threshold¹³. HUD staff reviewed the contract files maintained by the PED and the Human Rights and Equal Economic Opportunity Department. The reviewers were examining the files for documentation of compliance with Section 3. None of the contracts examined contained the required "Section 3 clause."¹⁴ Further, neither the project bid solicitations nor the official minutes of pre-bid and pre-construction conferences contained any reference to Section 3

The HOME Repayment Loan Agreements for the Winnipeg Apartments, Booth Brown Manor and for the Delancey/Selby Stone Apartments did contain a paragraph on Section 3, but it incorrectly stated that participation in the city's Vendor Outreach Program and Affirmative Action Program are required elements of Section 3 compliance. Nor did these documents include or reference the required Section 3 clause but rather recommended that sub-grantees utilize businesses located in, or owned by people living within, the seven county metropolitan area.

The Request for Qualifications for the Delancey/Selby Stone Apartments renovation

¹² The projects selected were Booth Brown Manor, Commerce Apartments, Delancey/Selby Stone Apartments, City House and Rice-Winnipeg Apartments.

¹³ 24 CFR 135.3(a)(3)(ii)(B) The requirements of this part apply to contractors and subcontractors performing work on Section 3 covered project(s) for which the amount of the assistance exceeds \$200,000; and the contract or subcontract exceeds \$100,000.

¹⁴ 24 CFR 135.38. All Section 3 covered contracts are require to contain a specific clause that details a contractor's Section 3 responsibilities.

project did state that Section 3 requirements apply. However, the Acknowledgment of Receipt of Compliance Documents for this project did not identify any subsequent compliance with Section 3.

Testimony or Other Evidence:

HUD staff reviewed materials developed pursuant to Mr. Newell's federal civil suit against the city of Saint Paul. This material is generally consistent with the information developed during the on-site compliance review. Robert Hammer, Director of Finance and Administrative Services for the city of Saint Paul, provided a sworn affidavit filed with the United States District Court in which he stated that the city of Saint Paul had never instituted, nor had in place at the time, a Section 3 certification and tracking program. Further, Mr. Hammer affirmed that the city had never submitted a Form 60002 to HUD nor was he familiar with a requirement to do so.¹⁵

Findings and Conclusions:

The city of Saint Paul (including the Saint Paul HRA) is not in compliance with the requirements of the Section 3. It cannot document compliance with the "greatest extent feasible" requirement of Section 3 by demonstrating that its contracting activities meet the numerical goals as set forth in the regulation.¹⁶ Nor has it implemented any of the specific activities defined by the regulation as recipient responsibilities. There are no procedures in place to: 1) notify Section 3 residents about training and employment opportunities generated by Section 3 covered assistance and Section 3 business opportunities;¹⁷ 2) notify potential contractors about the Section 3 requirements and ensure their compliance and their subcontractors' compliance with Section 3 requirements;¹⁸ 3) incorporate the Section 3 clause¹⁹ in all solicitations and contracts;²⁰ 4) facilitate the training and employment of Section 3 residents and the award of contracts to Section 3 business concerns;²¹ or 5) document the actions taken to comply with the Section 3 requirements, the results of the actions and impediments, if any.²² Furthermore, the recipient has not submitted the Form 60002 annually as required by the regulations.

¹⁵Second Affidavit of Robert Hammer dated October 3, 2006.

¹⁶ See 24 CFR § 135.30

¹⁷ See 24 CFR § 135.32(a)

¹⁸ See 24 CFR § 135.32(b)

¹⁹ See 24 CFR § 135.38

²⁰ See 24 CFR § 135.32(b)

²¹ See 24 CFR § 135.32(c)

²² See 24 CFR § 135.32(e)

The city asserts that notwithstanding its inability to document compliance with the "greatest extent feasible" requirement, to implement any of its defined program responsibilities, or to file Form 60002 annually, it administers its community development programs in compliance with Section 3 requirements. The city offers in support of this assertion the fact that HUD's Office of Community Planning and Development (CPD) reviews its community development activities annually to determine compliance with applicable laws and regulations and that the city routinely receives high rating from CPD. However, Section 3 compliance is not an element of a CPD annual review. Although HUD may periodically conduct Section 3 compliance reviews of selected recipients, it relies primarily on a recipient's self-certification in this regard. Absent reason to believe to the contrary, HUD accepts a recipient's self-certification as sufficient evidence that the recipient is carrying out its community development activities in compliance with Section 3. The Section 3 self-certification of compliance is included in every application for new or continued HUD funding.

Given this finding of noncompliance, the Assistant Secretary for Fair Housing and Equal Opportunity will take informal steps to bring this matter to a voluntary and just resolution in accordance with 24 CFR 135.76(f)(2).²³ Where attempts to informally resolve this issue fail, the Assistant Secretary will impose a resolution. Any resolution imposed by the Assistant Secretary will be in accordance with the regulations governing the particular HUD program(s) in question and may result in the imposition of program sanctions if appropriate. Please be advised that you have the right to appeal this decision with fifteen (15) days of the receipt of this notification by requesting a reconsideration of this action. Any request for reconsideration should specify the reasons why this decision should be reconsidered. Your request should be mailed directly to the Assistant Secretary for Fair Housing and Equal Opportunity at:

U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity
451 Seventh Street, SW
Suite 5100 Washington, D.C. 20410

If an appeal is not submitted during the indicated time above, you will be contacted by a staff person to begin the voluntary resolution process. If you have any questions

²³ Generally findings of noncompliance identified by way of a compliance review are resolved pursuant to 24 CFR 135.74 (c). However, since the compliance review resulted from an individual complaint, the Assistant Secretary has determined to resolve the matter in the manner detailed above.

regarding any aspect of this review, please contact Ms. Jaime Pedraza at 612-370-3000 ext 2130. Thank you for your cooperation.

Sincerely,



Barbara M. Knox, Director
Office Fair Housing & Equal Opportunity
Region V

cc: Cecile Bedor, PED
Robert Hammer, Administrative Team Leader
Fredrick Newell
Dexter Sidney, Field Office Director
Michele Smith, CPD Director
Jaime D. Pedraza, FHEO Director