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November 6, 2009

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW Room 10276
Washington, DC 20410

Re: Federal Register Docket Numbers [FR-5323-N-01 & FR-5323-N-02]

To Whom It May Concern:

On behalf of Citizens Housing and Planning Council (CHPC), I am pleased to submit the following comments in response to the notice published in the Federal Register on September 14, 2009 [Docket No. FR-5323-N-01] and the subsequent correction notice published on October 7, 2009 [Docket No. FR-5323-N-02]. Founded in 1937, CHPC is a non-profit research organization dedicated to improving housing and neighborhood conditions through the co-operative efforts of the public and private sectors.

For the following reasons, CHPC urges HUD not to discontinue the present "hold harmless" policy with regard to changes in the area median income.

First, thousands of affordable housing developments assisted through HUD's own HOME program would immediately be placed in financial jeopardy. Just like the Low Income Housing Tax Credit properties, HOME owners are contractually bound by long term commitments to maintain rents at levels tied to the Area Median Income (AMI). Specifically, each project must charge rents no higher than the lower of the applicable Fair Market Rent or ***"a rent that does not exceed 30 percent of the adjusted income of a family whose annual income equals 65 percent of the median income for the area, as determined by HUD."*** For practical purposes, almost all HOME developments must utilize the second, income driven, factor to set the maximum rents. In addition, for projects with 5 or more units, there are requirements to set aside units at lower rents geared to 50 percent of the AMI. Without the hold harmless provision, these properties would face the prospect of shrinking rental income revenue whenever area median income estimates are reduced.

HUD's HOME developments need to be protected for all of the same reasons that Congress acted to protect the Low Income Housing Tax Credit developments. In short, it is simply not practical to expect the owners of HOME projects, who face ever increasing operating expenses, to be able to operate these critical developments with reduced income through rent. As HUD's underwriting specialists know, a reduction in rental income coupled with increases in basic operating costs will lead to operating deficits. And once operating income becomes negative, properties will be

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unable to perform routine maintenance and become subject to missed debt service payments and possible foreclosure.

The elimination of the hold harmless policy would certainly mean financial losses for the private, and non-profit, owners of HOME properties, but unfortunately the people with the most to lose in this situation are the current tenants in these buildings who will see their homes deteriorate through no fault of their own. Close behind them are those financially strapped households on "waiting lists" who had hoped to "move up" by moving in to these properties and the residents in the surrounding area who will have to weather all of the negative consequences that occur when neighboring properties begin to fail. In fact, while technical in nature, the hold harmless provision could have broad impacts on community development. It would be ironic in deed if HUD's policy regarding median incomes were to bring about an increased number of defaults in the assisted housing portfolio at the same time it is spending billions of dollars through its NSP efforts to combat the results of the foreclosure crisis.

In addition, the elimination of the protections afforded through the hold harmless income provision would be a clear signal to prospective developers of HOME projects that any future development would be even more financially risky than they previously had reason to believe. This change cannot help but have a chilling effect on future participation in the program.

While HUD notes that it is considering "separately" whether to apply the same special protections currently effect for tax credit projects to HOME projects, it is simply not prudent to eliminate the general "hold harmless" provision until protections for HOME projects are in firmly in place.

As critical as they are, the HOME projects represent just one of the reasons to maintain the existing hold harmless policy with respect to AMI. In addition, HUD must consider the fact that many state and local governments have incorporated HUD's AMIs into their own programs. This is especially true in New York City, where tens of thousands of units have been, and are being assisted, through New York City's ten-year New Housing Marketplace Plan by programs that utilize median income figures to determine rents and/or income eligibility. While rent collection in these developments is not bound by federal law, they nevertheless do include long term contractual commitments by owners to limit rents to specified percentages of the established AMI. These programs were designed by New York City and others with the understanding that owners would not be faced with rent roll backs in those instances where the AMI estimates decreased.

Clearly the city relied on HUD AMI to set its underwriting standards, which cannot be adjusted for rent reductions. Now that legal documents have been executed, it is not at all clear how or if these provisions could be amended. It is impossible to know how many similar developments exist around the country, but for all of the same reasons that apply to the HOME and the tax credit properties, these developments need to be protected. And by far the simplest way to do that is to maintain the existing hold harmless policy with regard to changes in Area Median Income.

In addition to the impact on governmentally assisted rental properties, a change in the hold harmless provision could also have unwanted consequences for affordable homeownership programs. While the direct connection between income and rents obviously does not exist in homeownership programs, these initiatives do incorporate AMI in their structure. For instance, many HOME-assisted homeowner programs impose restrictions on the re-sale of the assisted property based on the income of the subsequent purchaser. Thus, in cases where the AMI decreased significantly a low or moderate income homeowner could find himself unable to retire his debt or recoup his investment in his home because of the limiting impact that the lower income restrictions would have on his pool of potential buyers.

These issues are more than hypothetical for those of us in New York City, where on more than one occasion, the so called "actual" incomes have been significantly over-estimated by HUD, triggering the need to adjust the "actual" figures downward as better data becomes available (usually the decennial census) and raising the specter of forced rent roll backs. In each occasion, the hold harmless provisions were employed and in fact our projects were generally not harmed. However, having been directly involved with many of the governmental officials, the property owners and the lenders during these periods, we are especially aware of how critical it is such a protection continues to be available.

Assuming that HUD agrees that it is not good policy to remove the existing protections for the array of existing projects mentioned above, it is important to determine whether it is better to protect these projects by trying to locate and catalog them all so they can be explicitly exempted from any future decreases in AMI or whether it is more appropriate to simply maintain the existing policy of freezing the income levels in cases where they would otherwise decrease. In this regard, HUD's notice suggests that there are some positive consequences in the form of greater income targeting for new projects that would come about through the use of an exemption or grandfathering system that would not accrue if the current hold harmless policy was simply extended. While we recognize the importance of targeting scarce resources, we do not, in fact, see the continuation of the current hold harmless policy to be at odds with the imperative to direct the bulk of federal assistance to those most in need. On the contrary, state and local governments will continue to have the ability and the inclination to target their programs to households at levels below the "hold harmless" maximums allowed under federal law. In fact, New York City has a long history of directing large amounts of its assisted housing resources to families in need many of whom earn well under the allowable federal limits.

Moreover, the income figures cited by HUD in its notice – with fully three quarters of all of the federally assisted households earning less than 30% of the AMI – demonstrate that this practice is widespread. That is, most state and local government agencies clearly end up with a tenant selection process that serves households with incomes well below the 50% of AMI and 80% of AMI maximums in place in most federal programs. There is no reason to believe that this natural targeting process will not continue to occur in areas that experience reductions in their "true" income limits. In fact, the annual notices published by HUD clearly state both the "actual" income estimate and the "hold harmless" level, so that local players can choose to adopt these as guidelines for their programs as they see fit.

Notwithstanding the merits of the argument on targeting, it is important to note that there is no indication whatsoever that the discontinuation of the existing hold harmless system would lead to any other potentially positive outcomes – for example, any cost savings for the government or any improvement in the quality of the housing.

On the other hand, we believe that there are some significant negative consequences that would occur if the exemption route is selected over continuing to hold incomes harmless. First, as noted above, it will be difficult for any federal regulation to accurately assess all of the many projects (including state and locally assisted developments) that depend on the AMI and to effectively exempt them from the negative impacts of future decreases in AMI. At the same time, any more general exemption language that attempted to include all projects that utilize AMI driven rent structures could possibly be considered not to apply to specific projects and as a result to lead to legal challenges.

Second, even if a perfect exemption system could be crafted, it could lead to a situation where rents in the assisted housing stock varied significantly from project to project within a given jurisdiction. For example, assume that several existing tax credit projects are exempted from the drop in incomes that occurs in 2009 and are allowed to maintain their rent structure. Now assume that incomes continue to decline over the next several years. Consequently, any new projects would utilize the lower or "actual"

AMI and would, as a result, have lower rents than the older projects. For example, an older project could effectively end up serving households at 67% of AMI rather than 60%.

Over a longer period of time, it is possible that tax credit buildings (as well as HOME or other locally assisted projects) in this community could end up having an array of different rent levels rather than the current system where there is an established rent which is well known, and used by government officials, advocates, developers, lenders, and potential tenants etc. The resultant variety of rents would make it difficult for localities to accurately assess the nature of their assisted stock and whom it was serving – or to describe their efforts to the public. In addition, the use of single consolidated waiting lists would become much more problematic with different properties using different rent levels.

Perhaps more importantly, there is a real possibility for some older developments to "price themselves out" of serving the population that are legally required to serve. For instance, assume that over a several year period a property ends up with rents that are actually set to a past 60% of AMI that is now equal to 75% of the new AMI that is in use for admissions. In this situation, even a family with the maximum allowable income (i.e. exactly at the new 60% of AMI level) would be forced to pay 38% of their income for rent rather than 30% as originally intended. This would be an intractable problem for these projects since they would have no recourse to serve households over the 60% of median level permitted by the IRS.

Depending on the structure and the eligibility rules of the particular program (e.g., tax credit, HOME, local programs, public housing, etc.) there is also the possibility that some existing tenants at, or near, the existing income cap for the program could be forced out of their unit if the income limits are allowed to decrease and their income (even if stagnant) is judged to exceed the new limit. It is difficult to assess the size of this problem, but it is a factor that must be considered.

For all of these reasons, and in light of the lack of compelling impetus to change the current policy, we urge HUD to maintain the practice of holding communities with decreasing incomes harmless from the potentially negative consequences. Thank you.

Sincerely,

Jerilyn Perine