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,

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2014 - HUD OGC - 3280 STANDARDS PREEMPTION

HUD Office of General Counsel Preemption Opinion on Minnesota Blower Door Test

National Manufactured Housing Construction and Safety Standards Act of 1974, section 604(d) (the Act)

(d) Whenever a Federal manufactured home construction and safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, 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. 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. Subject to section 605, there is reserved to each State the right to establish standards for the stabilizing and support systems of manufactured homes sited within that State, and for the foundations on which manufactured homes sited within that State are installed, and the right to enforce compliance with such standards, except that such standards shall be consistent with the purposes of this title and shall be consistent with the design of the manufacturer.

This is implemented in the regs at 24 CFR 3282.11:

(a) No State manufactured home standard regarding manufactured home construction and safety which covers aspects of the manufactured home governed by the Federal standards shall be established or continue in effect with respect to manufactured homes subject to the Federal standards and these regulations unless it is identical to the Federal standards.
(b) No State may require, as a condition of entry into or sale in the State, a manufactured home certified (by the application of the label required by § 3282.362(c)(2)(i)) as in conformance with the Federal standards to be subject to State inspection to determine compliance with any standard covering any aspect of the manufactured home covered by the Federal standards. Nor may any State require that a State label be placed on the manufactured home certifying conformance to the Federal standard or an identical standard. Certain actions that States are permitted to take are set out in § 3282.303.
(c) States may participate in the enforcement of the Federal standards enforcement program under these regulations either as SAAs or PIAs or both. These regulations establish the exclusive system for enforcement of the Federal standards. No State may establish or keep in effect through a building code enforcement system or otherwise, procedures or requirements which constitute systems for enforcement of the Federal standards or of identical State standards which are outside the system established in

these regulations or which go beyond this system to require remedial actions which are not required by the Act and these regulations. A State may establish or continue in force consumer protections, such as warranty or warranty performance requirements, which respond to individual consumer complaints and so do not constitute systems of enforcement of the Federal standards, regardless of whether the State qualifies as an SAA or PIA.
(d) No State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.

The Blower Door test is essentially a standard requiring remedial actions above and beyond what is required by the federal standards and it does not fall into the consumer protection or warranty exception of 3282.11(c) or the 3282.303 exceptions (e.g., monitoring dealer lots for safety, transportation of manufactured homes, etc.). Thus, the Act and the 3282.11 (b) and (c) preempt Minnesota's enforcement of the IECC standard.

As you know, the installations standards are at 24 CFR part 3285. They are minimal standards so the states can add more restrictive standards (unlike the construction standards of part 3280 which may not be altered). 24 CFR 3285.5 provides the definitions.

Installation standards. Reasonable specifications for the installation of a new manufactured home, at the place of occupancy, to ensure proper siting; the joining of all sections of the home; and the installation of stabilization, support, or anchoring systems.

This part covers such items as site preparation, foundations, anchoring systems, etc., and we cannot see how the Blower Door test would fit into such standards. Additionally, if a home fails the Blower Door test (regardless of whether the test was conducted in the factory or at the site), you have advised that the correction would have to be made at the factory. If so, it would be more of a construction defect than an installation problem.