The New HUD Policy on the Removal of Regulatory Barriers to Affordable Housing

By Anita R. Brown-Graham and David Owens

The School of Government has recently received a significant number of inquiries from state and local government officials about the U.S. Department of Housing’s (HUD) *America’s Affordable Communities Initiative*. In this new initiative, among other things, HUD gives funding priority to those communities that work toward identifying and removing the statutes, ordinances, regulatory requirements, and processes and procedures that appreciably increase the costs of building and rehabilitating affordable housing. Other federal agencies that fund affordable housing programs—such as the U.S. Department of Agriculture—may well follow HUD’s lead. Thus jurisdictions that want to compete successfully for affordable housing funds will probably need to bolster their efforts to reduce regulatory barriers. In North Carolina, however, questions abound about whether local governments have the legal authority to undertake some of the efforts that the federal government seeks to reward. This summary aims to identify and answer those legal questions.

**America’s Affordable Communities Initiative**

In March 2004, HUD unveiled the regulations governing its new system of awarding priority funding points to applicant communities able to demonstrate serious efforts to reduce the regulatory barriers that prevent families from living and working in the same community. [OK?] According to HUD, “over the last 15 years, there has been increased recognition that unnecessary, duplicative, excessive or discriminatory public processes often significantly . . . imped[e] the development or availability of affordable housing without providing a
commensurate or demonstrable health or safety benefit.” The “affordable housing” to which HUD refers is “decent quality housing that low-, moderate-, and middle-income families can afford to buy or rent without spending more than 30 percent of their income.”

**HUD Questionnaire**

As part of its funding application, HUD has prepared a questionnaire on regulatory barriers. This questionnaire is applicable to all programs for which Congress annually appropriates funds and for which HUD issues a Notice of Funding Availability. Thus it applies to HUD’s competitive grant applications. A full listing of the programs covered and the questionnaire are available in the *Federal Register* [69, 55 (March 22, 2004)] or at http://www.hud.gov/offices/adm/grants/frregbarrier.pdf. Although applicant communities are not required to respond to the questionnaire, positive responses may gain additional points on their applications.

The questionnaire is divided into two parts: Part A relates to applications submitted by local governments or applicants for projects in incorporated areas, and Part B pertains to applications by state agencies or applicants for projects in unincorporated areas. The questions contained in Part A are summarized and categorized below. You will find, after each group of questions, a brief description of the legal issues implicated. Also, because the state’s responses to Part B may be helpful to local governments answering the items in Part A, the state’s responses—prepared by the North Carolina Department of Environmental and Natural Resources, North Carolina Housing Finance Agency, and North Carolina Department of Health and Human Resources—are given below.
Part A contains twenty questions. The first two ask whether there is a “housing element” in the jurisdiction’s comprehensive plan and whether that element is adequate to anticipate future needs. The comprehensive plans of some North Carolina local jurisdictions do include a housing element, although none is required by G.S. 160A-383.

Questions 3 and 4 focus on whether local zoning ordinances create opportunities for, or barriers to, affordable housing. Many local comprehensive and land use plans address affordable housing needs and specify actions to respond to those needs. Other local regulations have been amended to aggressively promote various affordable housing options, such as rezoning to permit multifamily dwelling units and allowing accessory apartments. HUD will look favorably upon such regulations. On the other hand, HUD will view with disfavor zoning regulations that set minimum building-size requirements that exceed those explicitly required by health standards.

Questions 5, 6, and 7 ask about the local government’s use of impact fees and other significant development fees. Impact fees are an attempt to recover from private developers the public costs of local capital infrastructure and public service needs created by new development. In question 5, HUD seeks to determine whether state or local law authorizes the use of impact fees and the criteria used in calculating them. In North Carolina there is no state enabling legislation for general impact fees, although some jurisdictions (e.g., Orange County) have sought special local authority to enact them. The state does, however, authorize local governments to charge fees to cover certain public utility costs associated with development (primarily water and sewer costs). When utility fees are charged, there must be
a reasonable relationship between the maximum fee charged and the impacts/costs generated by a particular development.

Questions 8 and 9 concentrate on the type and burdensome nature of the jurisdiction’s building codes. HUD states a preference for compliance with model building codes, including the International Code Council’s model, which North Carolina has adopted.

In question 10, HUD addresses the issue of manufactured housing. The question seeks to determine whether the zoning ordinance permits manufactured housing as of right in residential districts and in zones in which similar site-built housing is permitted. Although local governments may not enact zoning that excludes manufactured housing from their entire jurisdiction (G.S. 160A-383.1), the state does not require that any particular land be zoned for this type housing. Conversely no state law prohibits the creation of districts for manufactured housing as of right. Many North Carolina jurisdictions, in fact, allow manufactured housing by right in all residential districts. Others allow such housing in most areas.

Questions 11, 12, 13, and 14 are intended to ascertain the jurisdiction’s level of energy and innovation in creating affordable housing strategies. These questions ask, in particular, about locally initiated reviews and reforms of regulatory barriers, including the modification of infrastructure standards. Some North Carolina jurisdictions have waived infrastructure requirements or voluntarily agreed to publicly fund infrastructure associated with affordable housing projects. Question 14 asks about the use of density bonuses “as of right” in incentive zoning. Wilmington, Durham City and County, Winston-Salem and Forsyth County, and Orange County have all received authorization to utilize density
incentives to promote affordable housing.\(^1\) The legislature has either amended the local government’s charter or amended application of the zoning enabling statutes to the local government.\(^2\) It is not clear, however, that such action by the legislature is required for a local government to offer a voluntary density bonus in exchange for a developer’s agreement to produce affordable housing.

Questions 15, 17, and 20 focus on whether the local jurisdiction’s general permitting and review processes are expeditious and streamlined. In Question 20, HUD asks whether jurisdictions are requiring affordable housing proposals to face public scrutiny that is not required of non affordable housing projects. There are no legal obstacles to streamlining and expediting permits and reviews, and many local governments in North Carolina have sought to do so. Similarly, there is no state law that would require affordable housing proposals to be subject to greater public scrutiny.


Questions 16 and 19 focus on whether the jurisdiction gives special consideration to affordable housing projects in its permitting and review processes and parking requirements. State law does not prohibit local governments from granting preferential status, either in their processes or in their local regulations, to affordable housing projects.

North Carolina Response to Questionnaire for HUD’s Initiative on Removal of Regulatory Barriers (HUD Form 27300, prepared June 3, 2004)

The following responses to the questionnaire relate to Part B only and were prepared by staff at the North Carolina Department of Environmental and Natural Resources, the North Carolina Housing Finance Agency, and the North Carolina Department of Health and Human Services. Assistance was provided by the Institute of Government at UNC-Chapel Hill and the state chapter of the American Planning Association.

Part B contains 15 questions and the responses below provide a total of four “yes” answers (See questions 10, 12, 13, and 15) which will enable applicants to receive one extra point on their application score.

For further information on the HUD Questionnaire, please contact Gary Dimmick, Director of Community Planning and Development, HUD Greensboro Office, 336-547-4006. For information concerning the responses to the HUD Questionnaire, please contact Candace H. Stowell at the North Carolina Housing Finance Agency, 919-877-5633 or chstowell@nchfa.com.
1. Does your state, either in its planning and zoning enabling legislation or in any other legislation, require localities regulating development have a comprehensive plan with a “housing element”? If no, skip to question #4.

   No.

   *North Carolina law states that zoning regulations must comply with comprehensive plans, but there is no mention of “housing elements” in comprehensive plans (GS 160A-383).*

2. Does your state require that a local jurisdiction’s comprehensive plan estimate current and anticipated housing needs, taking into account the anticipated growth of the region, for existing and future residents, including low-, moderate- and middle-income families, for at least the next five years?

   No.

   *N/A*

3. Does your state’s zoning enabling legislation require that a local jurisdiction’s zoning ordinance have: (a) sufficient land use and density categories (multifamily housing, duplexes, small lot homes and other similar elements); and (b) sufficient land zoned or mapped in these categories, that can permit the building of affordable housing that addresses the needs identified in the comprehensive plan?

   No.

   *N/A*

4. Does the state have an agency or office that includes a specific mission to determine whether local governments have policies or procedures that are raising costs or otherwise discouraging affordable housing?
5. Does your state have a legal or administrative requirement that local governments undertake periodic self-examination of regulations and processes to assess their impact upon housing affordability and undertake actions to address these barriers to affordability?
   **No.**

6. Does your state have a technical assistance or education program for local jurisdictions that includes assisting them in identifying regulatory barriers and in recommending strategies to local governments for their removal?
   **No.**

7. Does your state have specific enabling legislation for local impact fees? If no, skip to question #9.
   **No.**

   There are some local governments that been given authority by the State to impose impact fees, such as Orange County, but there is no enabling legislation that applies to the whole state.

8. If yes to question #7, does the state statute provide criteria that set standards for the allowable type of capital investments that have a direct relationship between the fee and the development (nexus) and a method for fee calculation
   **No.**

   **N/A**

9. Does your state provide significant financial assistance to local governments for housing, community development and/or transportation that includes funding
prioritization or linking funding on the basis of local regulatory barrier removal activities?

No.

10. Does your state have a mandatory state-wide building code that (a) does not permit local technical amendments and (b) uses a recent version (i.e., published in the last five years or, if no recent version has been published, the last version published) of one of the nationally recognized model building codes (i.e., the International Code Council (ICC), the Building Officials and Code Administrators International (OCA), the Southern Building Code Congress International (SBCI), the International Conference of Building Officials (ICBO), the National Fire Protection Association (NFPA)) without significant technical amendments or modifications? Alternatively, if the state has made significant technical amendments to the model code, can the state supply supporting data that the amendments do not negatively affect affordability?

Yes.

North Carolina uses ICC.

11. Has your state adopted mandatory building code language regarding housing rehabilitation that encourages rehabilitation through gradated regulatory requirements applicable as different levels of work are performed in existing buildings? Such language increases regulatory requirements (the additional improvements required as a matter of regulatory policy) in proportion to the extent of rehabilitation that an owner/developer chooses to do on a voluntary basis and. For further information see HUD publication: “Smart Codes in your Community: A Guide to Building Rehabilitation Codes” (www.huduser.org/publications/destech/smartcodes.html).

No.

12. Within the past five years has your state made any changes to its own processes or requirements to streamline or consolidate the state’s own approval processes involving permits for water or wastewater, environmental review, or other state-administered permits or programs involving housing development. If yes, briefly list these changes.

Yes.
The Department of Environment and Natural Resources (DENR) has made the following changes:

**General permits** – DENR has developed a large number of general permits for activities that are substantially similar. This allows projects to go forward without individually needing public notice. Probably where this is most significant for the development community is the Construction General Permit. This ties the federal requirement to the Erosion and Sediment Control Program existing in NC. Since there are more requirements at the federal level than the E&S Control program, there are additional conditions that have to be included in the NPDES permit. However, DENR has issued a general permit (requiring notice once every five years STATEWIDE, as opposed to each and every project requiring public notice), that is then issued to the construction activity as they get their E&S approval, whether it is done locally or by the Division of Land Resources. This is just one of the many general permits that DENR has issued.

**The wetlands "triage" process** - twice weekly, DENR staff triage the wetland 401 certification applications to determine if DENR can issue some rapidly through the existing general certifications or if DENR needs a more in depth review. About 50% of these projects are issued immediately following the triage process. The remainder of the projects either need additional information or a field visit/regional office involvement. DENR has delegated the authority to make decisions on the general certifications to five of the seven regional offices (the remaining two offices have not received delegation due to staff turnover and the delays of getting those
projects resolved at that level). These are efforts to be responsive to the development community.

Express permitting – DENR has expanded this beyond the area of the permitting that the General Assembly initially directed DENR to implement, recognizing that some of the wastewater systems that people need permitted through the DENR nondischarge program are directly tied to development activities. DENR has had considerable success in our trial balloons and is working with the committees at the General Assembly on how this might be expanded.

DENR is working on a number of data management projects that should help speed up various activities as well, that should enable us to devote more dedicated efforts to increasing our efficiency and effectiveness in permitting.

13. Within the past five years, has your state (i.e., Governor, legislature, planning department) directly or in partnership with major private or public stakeholders, convened or funded comprehensive studies, commissions or panels to review state or local rules, regulations, development standards, and processes to assess their impact on the supply of affordable housing?

Yes.

The State of North Carolina established a Commission on Smart Growth, Growth Management, and Development in 1999. The Commission’s recommendations (Fall 2001) included several related to affordable housing. Goal 2.1 of the Community and Downtown Vitality Work Group calls for local communities to prepare “comprehensive local growth plans.” One of the strategies listed under Goal 2.1 is to “require that all plans analyze the need for affordable
housing based on available data and established criteria, and how needs will be addressed.”

In addition, the North Carolina General Assembly created the Joint Legislative Growth Strategies Oversight Committee in January 2002. The Growth Strategies Oversight Committee will study the recommendations of the Commission on Smart Growth, Growth Management, and Development and will also consider additional strategies including “removing barriers to affordable housing and preserving housing choice…” The Oversight Committee will also “determine how to increase the full range of affordable housing opportunities for low-income and moderate-income North Carolinians.” The Oversight Committee must submit recommendations to the General Assembly prior to January 16, 2005.

14. Within the past five years, has the state initiated major regulatory reforms either as part of the above study or as a result of information identified in the barrier component of the state’s “Consolidated Plan submitted to HUD”? If yes, briefly list these major regulatory reforms.
   No.

15. Has the state undertaken any other actions regarding local jurisdiction’s regulation of housing development including permitting, land use, building or subdivision regulations, or other related administrative procedures? If yes, briefly list these actions.
   Yes.

   In 1987 the State approved legislation that a locality cannot refuse to zone any land for manufactured housing (GS 160A-383.1). In 1981, the State approved legislation that provides that certain family care homes must be treated as a
residential use of property for zoning purposes (GS 168A-22). Family care homes cannot be excluded from residential zoning districts and local governments cannot impose special review requirements, such as a conditional or special use permits.