

Manufactured Housing Consensus Committee

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August 29, 2003

US Department of Housing and Urban Development
Robert C. Weaver Building – 451 Seventh Street, S.W.
Washington, DC 20410

ATTENTION: Secretary Mel Martinez

Dear Secretary Martinez:

Pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974, I am formally transmitting comments to an Advanced Notice of Proposed Rule Making (ANPR). The proposed rule concerns 24 CFR, Part 3286, Manufactured Housing Dispute Resolution Program. This is identified as Docket No. FR-4813-A-01/RIN 2502 – AH98 (Federal Register Notice of March 10, 2003 (68 FR-11451 – 11454)).

The comments and responses to the proposed rule were approved in a voice vote by the MHCC in accordance with Section A.8.5 of the bylaws and represents the official position of the MHCC for purposes of providing comments on this issue. The vote was 17 in favor and 4 absent.

The information contained in these comments from the MHCC was provided during meetings of the MHCC held on:

28-30 May 2003

20-22 August 2003

On behalf of the MHCC and in my capacity as the Project Manager with the Administering Organization, I am submitting this information for your review in response to the ANPR as required by the provisions of the 1974 Act.

Secretary Mel Martinez
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Please contact me if you or your staff have any questions on this submission.

Sincerely

A handwritten signature in cursive script that reads "Robert E. Solomon".

Robert E. Solomon, PE
Project Manager
Administering Organization

RES:jtm

CC: DFO, Administrator of the Federal Manufactured Housing Program
MHCC Members

ENCLOSURES

A. MHCC Response to ANPR-Dispute Resolution

ENCLOSURE A

Manufactured Housing Consensus Committee

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MANUFACTURED HOUSING DISPUTE RESOLUTION PROGRAM COMMENTS AND RESPONSES FROM THE MHCC 27 AUGUST 2003

I. Introduction

The Manufactured Housing Consensus Committee respectfully submits comments in response to the Advanced Notice of Proposed Rulemaking (ANPR) – Manufactured Housing Dispute Resolution Program, noticed in the *Federal Register* of March 10, 2003 (68 FR 11451-11454).

II. General Comments

HUD is in the position to develop its dispute resolution (DR) program as required by the Manufactured Housing Improvement Act of 2000 (the Act). Under section 623(c)(12), the Secretary has the authority to approve any state plan that includes a dispute resolution program which provides for the timely resolution of disputes between manufacturers, retailers, and installers of manufactured homes.

Any state or federal dispute resolution program must address five essential elements: (1) the timely resolution of disputes; (2) resolution of disputes between three parties (manufacturers, retailers and installers); (3) determination of the responsibility for defects; (4) authority to issue orders for the corrective repair of the defects; and (5) the questionable defects must be reported within one-year of installation of the home.

It is paramount that HUD consider state issues when developing its DR program. Many states have a process or procedure in place to resolve disputes between various parties. The process may not presently include resolution of disputes between manufacturers, retailers and installers. However, states should have the option of altering existing DR systems to include these parties as opposed to bearing the costs of creating a new system.

III. State Program Standards

1. What process should be used to determine whether the proposed state programs meet the Act's requirements? Is proof of adequate funding of a state's program necessary for approval?

Prior to December 27, 2005, each state should be required to certify that its new or existing state dispute resolution program, using a standard form designed by HUD, meets or exceeds the requirements of the Act. An official in the State agency responsible for its manufactured housing program should sign this certification. HUD shall make a timely determination, using the documents submitted by the state, and respond to the state as: approved, conditionally approved or rejected. If a state is conditionally approved or rejected, HUD shall submit a complete and detailed explanation to the state on what actions must be taken in order to bring the program into compliance. States shall have the ability to provide additional documentation should HUD determine that the state's DR program does not comply. HUD shall recognize a state's good faith efforts and permit the state reasonable time to make the necessary revisions to its program before assuming responsibility for the State's DR process at HUD. Fully or conditionally approved states shall re-certify their dispute resolution programs as meeting or exceeding the requirements of the Act anytime its dispute resolution program has been significantly modified or revised or every 60 months, whichever occurs first.

HUD shall encourage states to implement their own dispute resolution program to take the burden away from the Department. HUD shall not address the method and/or amount of funding for a state's dispute resolution program. Adequate funding is a subjective term that will vary greatly from state to state. Furthermore, funding is not addressed by the Act. Each state reserves the right under state laws to devise

its own mechanism for funding this process.

In default states, the parties involved in the dispute resolution should pay the program fees, if any.

2. How will the state programs be funded? Is there a difference for funding purposes between a dispute resolution program that is a part of an approved state plan and a program that is not? Can accepted states establish additional fees to cover the cost of their programs?

Charging a fee for each proceeding, instead of using a portion of a state's fund entitled to each through label fees, would encourage settlement of disputes outside the program boundaries. The parties found responsible by the decisionmaker should be required to pay their proportionate costs for the dispute resolution process.

3. What type of oversight should HUD exercise over the state programs to ensure that the programs continue to meet statutory requirements? Should HUD conduct periodic reviews of the state programs to ensure that their programs still meet the Act's standards? If so, how often?

Certified state Dispute Resolution Programs should be re-certified as meeting or exceeding the requirements of the Act anytime the program has been significantly modified or revised, or every 60 months, whichever occurs first. Upon this re-certification, the state program should continue under the requirements of the Act.

4. If HUD determines that state programs meet statutory requirements, how long should that determination be in effect? How should HUD provide notice that a state's program will be acceptable and HUD's program will not be used in the state?

See #3 above.

IV. Federal Program Structure

5. What type of dispute resolution program should be instituted in order to achieve the Act's goal of protecting the quality, durability, safety, and affordability of manufactured homes? Should HUD model its program after one of the widely recognized dispute resolution programs e.g. arbitration, mediation, a hybrid of the two, or some other method? Please articulate your reasons.

In default states, HUD's dispute resolution program should be based on maintaining the quality, durability, safety and affordability of manufactured housing. The program should be initiated when the involved parties (manufacturer, retailer and installer) do not agree on any corrective measures among themselves for any dispute(s) in question. The program decision making process could be conducted under the direction of a neutral contractor and/or third-party provider designated by HUD. If this avenue were taken, then costs associated would be based on the decisionmaker's (contractor or third-party provider) requirements. One example of the steps in the process could be: 1) the decisionmaker convenes a meeting at the home site; 2) representatives from each party, including the consumer, are invited to attend; 3) the decisionmaker reviews the issues and hears each party's views; 4) the decisionmaker issues a decision and assigns responsibility within a certain established timeframe; 5) the decisionmaker sets the timeframe for corrective action.

In default states, HUD should always attempt to use any dispute resolution program readily available within the state. If HUD is unable to establish a simplified process as outlined above or participate in an existing dispute resolution program, and finds it necessary to establish a more formalized program, it should consist of a mediation and arbitration process, modeled from the recommendations proposed by the Consumer's Union consisting of:

- A short mediation process, similar to the Better Business Bureau's procedures, with an imposed time limit,
- A fair arbitration process that is voluntary on the part of all parties involved.
- All rules governing the process shall be clearly disclosed.
- No arbitration clause shall limit an individual's ability to join with other similarly harmed

consumer/company in a class-action lawsuit.

In SAA states, or states with existing DR programs, the state should have the option of choosing the method that best complies with existing laws and rules.

6. Should HUD's dispute resolution program be modeled after a preexisting state run dispute resolution program? If so, identify the state model that should be followed and indicate the reasons why. What changes would be needed to make the state program fully compliant with the purposes and requirements of the Act?

Please see responses to question #5 above. HUD must review the options available for dispute resolution in those states which do not have a certified dispute resolution program. Any program offered by HUD should take advantage of the resources readily available in the default states.

7. Should HUD incorporate an adversarial component (e.g., parties are represented by attorneys) into its dispute resolution program?

No.

V. Federal Program Complaint Process

8. Who should be permitted to lodge a complaint? Who are the parties eligible to participate in the dispute resolution process? How can a consumer initiate the dispute resolution process? Who should incur the costs associated with filing and addressing a complaint? How should the dispute resolution initiation process be structured? What type of information and documentation should the complainant provide in order to initiate an action?

The word "complaint" does not appear in the Manufactured Housing Improvement Act of 2000. We will use the appropriate language in our responses.

Any party to the process (the consumer, manufacturer, retailer or installer) should be permitted to initiate the dispute resolution process.

In states having certified dispute resolution programs, decisionmakers (SAAs, neutral contractors or third-party agencies) have already been selected to handle the dispute program. Many states have existing processes that cover aspects such as who can initiate the dispute resolution process, the process that is followed to rectify the dispute, and how fees are assessed to fund the process.

In default states, the manufacturer, retailer, installer and/or the consumer/homeowner should be the parties that can initiate the dispute resolution process within the first year of home installation. All parties involved (decisionmaker, manufacturer, retailer, installer and homeowner) should be available to participate in the dispute resolution process.

If the consumer/homeowner desires to initiate the dispute resolution program process, the consumer/homeowner must first notify the retailer, manufacturer and/or installer, and allow reasonable time as required in Part 3282 for the defect to be rectified before requesting dispute resolution regarding the defect. The federal dispute resolution process should be initiated by a formal written request for dispute resolution to HUD's designated decisionmaker in the state (state-based programs already will contain a method to request dispute resolution). The decisionmaker would then set the process in motion by informing the parties involved by written notification. The decisionmaker should notify each of the potentially responsible parties, identify the costs, if any, associated with each step of the DR process and provide any documentation necessary. The federal dispute resolution program should have a standardized form to file a formal written or electronically transmitted request for dispute resolution, similar to many state-based programs. Filing requests for dispute resolution by phone call should be prohibited except in cases involving life-safety issues. The request for dispute resolution form should have the following information:

- Name, address and contact information of the homeowner.

- Name and contact information of manufactured home producer, retailer and installation company.
- Date of purchase or installation date if known or the date which is 90 days after the installation date agreed to by the buyer in the purchase agreement.
- Description of alleged defect (related to the HUD Code or the installation requirements), when the defect was first noticed and if the defect caused any additional problems.

The party(s) ultimately found responsible by the decisionmaker should bear the costs of the dispute resolution process.

9. Should HUD involve consumers in a process that involves manufacturers, retailers, and installers?

As suggested under question #8, the manufacturer, retailer, installer or the homeowner must first initiate the formal request for dispute resolution. Consumers are eligible to participate in the process if they desire.

10. Should time limits be established for presenting evidence or reaching a decision or resolution? If so, how long?

The timely correction of defects is in everyone's best interest.

Resolution should be completed within 60 days (see Question #26 for exception).

Within 10 days of receipt of a request for dispute resolution, notice of the dispute resolution process should be sent to all parties, allowing each party at least 14 days notice of the date set aside for the dispute resolution. Within 7 days following a dispute resolution process, the decisionmaker should submit a final decision to all parties. Extensions may be granted if there are extenuating circumstances.

11. Should the decisionmaker or any other authority be permitted to dismiss a complaint if it is deemed not credible, or frivolous? What criteria or filtering process should be established to eliminate complaints that lack merit?

The decisionmaker should have the ability to dismiss any request for dispute resolution if determination has been made that the implied defect related to the standards (HUD Code) or the installation requirements is not a defect, acknowledged defect was caused by the homeowner, or the statutory one-year installation period had lapsed prior to the filing of the request for dispute resolution.

12. Once a complaint has been reported, what process should be used if a complainant elects to withdraw the complaint? If the complainant withdraws the complaint, may the decisionmaker still issue a corrective order?

The party requesting dispute resolution should be able to withdraw the request at any stage of the DR process and at anytime before the decisionmaker issues a final decision by providing written notification to the parties involved including the decisionmaker. If a request for dispute resolution is withdrawn prior to the decisionmaker issuing a corrective order, a corrective order should not be issued and the party(s) correcting the problem(s) should be responsible for all costs.

13. How will the parties be notified that a complaint has been reported (such as by registered letter, etc.)? How much advance notice will be given to the parties before they must appear before the decisionmaker? What kinds of information should HUD provide to the parties in a notice?

Written notification that dispute resolution has been requested should be sent to all parties involved by certified mail - return receipt requested with a second copy by first class mail at least 14 days prior to the date they must appear before the decisionmaker. The notification should include a copy of the request for dispute resolution and information explaining the dispute resolution process.

14. Should any persons, decisionmakers, or HUD be permitted to join together several complaints involving common issues?

Each dispute resolution case should be considered separately unless all parties consent to joining together multiple disputes.

VI. Federal Program Mechanics

15. Should the decisionmaker's corrective orders be final or should there be an appellate process? If there is an appellate process, how should it be structured?

The decisionmaker's determination should be final and binding to the extent permitted under state law for the manufacturers, retailers and installers. If any party, including the homeowner, is not satisfied, they can pursue all legal actions and remedies permitted under the law.

16. If one party does not wish to participate in the resolution of a dispute through the program, should there be a default decision? If so, is there a need to provide protections against nuisance filings?

All parties are eligible to participate in the process; however, a lack of participation does not exclude the party from being bound by the decisionmaker's ruling. No default decision should be issued based on a certain party's non-participation in the process.

17. Should the decisionmaker be required to have knowledge of the manufactured housing industry? How much experience, if any, should the decisionmaker be required to have and what type? If the decisionmaker is required to have experience, how will this experience be measured? If no prior industry experience is necessary, should the decisionmaker be given training related to the industry? If yes, who should provide the training and how should it be funded?

The decisionmaker should have the necessary knowledge and experience to address the particular issue in question. The decisionmaker should have some basic knowledge of the manufactured housing industry (construction, installation and regulation), or experience with residential construction. Any decisionmaker acceptable to all parties may be used.

18. Under what circumstances and how should a decisionmaker be removed from a case?

Designated decisionmakers should be neutral third parties. A decisionmaker should excuse or remove itself from the process if there is a conflict of interest with any of the parties involved.

19. Who should be approved to serve as a decisionmaker? Should anyone be disqualified from serving as a decisionmaker based on conflicts of interest or other concerns? Should complaints and corrective orders be made public?

See responses to questions #17 and #18 above. The decisionmaker shall be from state government or a neutral third-party agency or shall be an individual that all parties to the dispute have agreed upon. Requests for dispute resolution or corrective orders should not be made public except as required by federal or state law.

VII. Federal Program Evidence Standards

20. What kinds of evidence should be accepted during the dispute resolution process? Should the presentation of evidence be conducted via oral testimony or in writing? If evidence is presented in writing, should there still be an opportunity for oral testimony? If there is an oral hearing, how much time should each party be given to present its evidence? Should cross-examination be permitted if there is an oral hearing?

Most evidence will be presented either during the phone conference or at the home site. All pertinent facts and supporting documents should be presented in writing or through oral presentation to the decisionmaker. Cross-examination should not be necessary unless under certain circumstances determined by the decisionmaker.

21. Should the decisionmaker be permitted to conduct outside investigations or be limited to the specific facts of the complaint? Should the decisionmaker be permitted to consider extraneous

information, such as the past behaviors of the parties? Should the decisionmaker be permitted to conduct on-site visits?

The decisionmaker should first try to resolve the dispute with a phone conference; however, a visit to the home site with the participants involved may be necessary. Outside investigations should be permitted at the discretion of the decisionmaker. Each dispute and the resulting DR process should stand-alone and be decided on its own merits on the specific facts of the single dispute.

22. Should the decisionmaker have the authority to compel testimony?

All potential parties should be invited to participate in the process. If one or several of the parties elect not to participate, they should not be compelled to appear or testify.

23. Should the contents of the hearing be recorded or transcribed? If so, who should be responsible for verifying the accuracy of the records or transcripts? Who should incur the cost of reporting and/or transcription? Where should the records from a proceeding be kept? If there is a record-retention requirement, how long should the records be maintained?

Recording should be permitted only upon the request of a party with the approval of all participants. The requesting party should be responsible for any transcribing fees. The final ruling should be filed with the decisionmaker and a notice of the ruling sent to the parties. The parties involved shall be responsible for retaining the final ruling for a minimum of five years.

VIII. Defects

24. What types of events constitute the reporting of a defect within the 1-year period for initiating a dispute resolution process?

The existence of any unresolved dispute that was properly reported during the warranty period.

25. What will define the date of installation as prescribed by the Act? Should there be any limit on the kinds of defects subject to resolution through such procedure?

The date of installation shall be the earlier of either the date of occupancy as certified by the Authority Having Jurisdiction (AHJ), or 90 days after the installation date agreed to by the buyer in the purchase agreement or sales contract. As noted previously in response to question #8, an alleged defect must be related to the federal standards (HUD Code), the installation requirements for the home in question, or the contractual agreement.

26. What should the decisionmaker do if she or he deems a situation is likely to cause imminent peril to the public health, safety, or welfare? Should the decisionmaker be permitted to issue an interim order to provide temporary relief pending a final decision? Should the decisionmaker be required to report the defect immediately to HUD?

The decisionmaker should make immediate determination of responsibility and the responsible parties must act immediately to correct the situation. These questions should not be a consideration in HUD's development of its dispute resolution program. The current SAA program or a Subpart I investigation addresses these issues.

IX. Federal Program Corrective Action Process

27. How long will a party subject to an order have to take corrective measures? Should the decisionmaker have the authority to grant additional time to make corrections?

A 30-day period seems plausible for corrective repairs or a time period agreed to by all parties involved.

Once a firm length of time has been determined for the corrective measure, there should be extensions for reasonable and just causes, or by mutual agreement of the parties involved.

28. Who should determine whether the corrections are acceptable? If the decisionmaker has to conduct a final review to ensure that the corrections have been made, which party should incur the

cost? Should the decisionmaker notify the parties after corrections have been found to be acceptable?

This response relates to default states. The decisionmaker should determine whether corrective repairs are acceptable and notify all parties. The responsible party incurs the cost for the corrective repairs and final review.

29. What should the penalty be if a party fails to comply with a corrective order?

State laws control penalties for those that fail to abide by a decisionmaker's determination. Since many states have dispute resolution programs in existence, it must be cautioned that any federal attempt to set or amend current state programs could cause repercussions. The federal program cannot be arbitrarily imposed on states that have certified dispute resolution programs.

In default states, the final decision ruling sent to the homeowner should include information on the homeowner's legal rights and remedies if the responsible party fails to comply with the decisionmaker's determination. The decisionmaker should be aware of any state laws which may apply, including penalties.

30. What should be the scope of the corrective orders? Should a corrective order be limited to the affected home? Should parties be allowed to make corrections to a home involved in a dispute before the decisionmaker issues an order?

Corrective orders should address only the repair or remedial measures outlined in the decisionmaker's initial determination. Any order should only address the home in question. Participants should be encouraged to provide corrective measures before any decisionmaker's determination.

The party initiating the DR process would be responsible to withdraw the request if corrective measures are completed prior to a determination by the decisionmaker.

X. General Questions

31. How should consumers be made aware of the existence of the federal and state programs (e.g., by use of consumer manuals, posting a notice in each home, etc.)?

Information on the DR program should be made available in a standard notice that the retailer must provide to each consumer at the time of sale. The notice should include contact information for the DR program in each state. The consumer should be required to sign the notice, and a copy of it should be retained by the consumer and retailer.

32. Are consumers and other parties limited in the types of disputes that can be raised? If so, how are they limited?

The disputes being considered should be limited to defects as defined in the National Manufactured Housing Construction and Safety Standards Act, at Section 603(3), as implemented by HUD in three definitions found in the Federal Manufactured Home Procedural and Enforcement Regulations, at 3282.7(J) "Defect;" (P) "Imminent Safety Hazard;" and, (FF) "Serious Defect". The only limit included in the Act is the time limit for defects one-year after installation. The decisionmaker must determine if requests for dispute resolution are justified or frivolous.

33. Should contractors be used to assist HUD in carrying out its new responsibilities for dispute resolution under the Manufactured Housing Improvement Act?

Contractors could provide assistance in the dispute resolution process for default States that do not have a certified dispute resolution program conforming to the requirements of the Act.