



The Southern California Affiliate of The Lawyers' Committee for Civil Rights Under Law

June 27, 2018

VIA EMAIL

Honorable Members of the City Council  
Los Angeles City Hall  
200 N. Spring Street  
Los Angeles, CA 90012

**Re: Proposition HHH Permanent Supportive Housing Program Regulations  
(Council File 17-0090-S8)**

President Wesson and Honorable Members:

Public Counsel is the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law and the nation's largest pro bono law firm of its kind. We represent a wide range of non-profit community development organizations, social service organizations, and individuals involved in the production and preservation of affordable housing in the City, as well as low-income individuals eligible to reside in such housing. Our activities include homelessness prevention and community development, which affect a wide spectrum of people who live at or below the poverty level.

We write to reiterate our concerns over the Proposition HHH Permanent Supportive Housing Program Regulations recommended by the Homelessness and Poverty Committee on June 20, 2018. Specifically, we urge you to remove the threshold requirement in subsection 2.7, requiring a letter of acknowledgment from the councilmember in whose district the development will be located. This requirement raises significant legal issues, many of which we described in detail in our October 27, 2014 letter to the City's Housing and Community Investment Department (attached herein and incorporated by reference).

The letter requirement empowers "not in my backyard" opponents of supportive housing projects, often based on unfounded stereotypes of the proposed project's intended residents. As a result, much needed projects are delayed, watered down, or stopped entirely. Meanwhile, on any given night, tens of thousands of our City's residents sleep in vehicles, makeshift shelters, emergency shelters, or temporary housing—with no permanent place to call home. Recent reporting by the Los Angeles Times illustrates the counterproductive and potentially discriminatory effect of these requirements: proposed projects for chronically homeless individuals cannot move forward because the local councilmember will not issue a letter of acknowledgment.<sup>1</sup>

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<sup>1</sup> See Emily Alpert Reyes, *L.A. lawmakers can block homeless housing projects by simply withholding a key letter*, L.A. TIMES, March 12, 2018 and Emily Alpert Reyes, *Here's how easy it is to block a homeless housing project in L.A.*, L.A. TIMES, March 31, 2018.

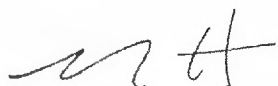
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Public Counsel is not alone in expressing concern about these requirements. On December 14, 2017, we joined with over 50 organizations that provide services or housing to people experiencing homelessness and called on the City to reconsider the councilmember letter requirements.<sup>2</sup> The Los Angeles Times Editorial Board has also urged the City to remove the letter requirement from the HHH regulations.<sup>3</sup> The concerns raised herein apply equally to the letter of acknowledgement requirement and letter of support requirement in subsection 2.7 and subsection 7.3 of the Affordable Housing Managed Pipeline regulations.

To be clear, the councilmember letter requirements have acted, and will act, as barriers to building affordable and supportive housing for low-income people, veterans, people of color, people that are homeless, and people with disabilities, among others. We believe that enforcing the letter requirements constitutes a discriminatory action, in violation of the Fair Housing Act, Fair Employment and Housing Act, Title II of the Americans with Disabilities Act, 42 U.S.C. Section 1983, and the Rehabilitation Act, among others. The requirements also conflict with Cal. Gov. Code Sections 65008, 65583, policies and programs of the City's Housing Element aimed at encouraging supportive and affordable housing, and the laws and regulations governing the state and federal low-income housing tax credit program. We strongly object to the Homelessness and Poverty Committee recommendation to include this requirement in the final regulations. If the City Council adopts the proposed regulations, we intend to explore other options including litigation, to address these barriers to much needed housing. We welcome the opportunity to meet with you to discuss these concerns.

Sincerely,



Greg Bonett, Staff Attorney  
Public Counsel  
Community Development Project

Cc: Holly L. Wolcott, City Clerk  
City of Los Angeles

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<sup>2</sup> Communication from the Provider Alliance to End Homelessness in Council File 17-1422.

<sup>3</sup> The Times Editorial Board, *L.A. City Council members shouldn't have the power to veto homeless housing projects at a whim*, L.A. Times, March 17, 2018.

## Attachment A



THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS  
The Southern California Affiliate of The Lawyers' Committee for Civil Rights Under Law

October 27, 2014

City of Los Angeles  
Housing and Community Investment Department  
1200 West 7th Street, 1st Floor  
Los Angeles 90017  
HCIDLA.NOFA@LACITY.ORG

**Re: Affordable Housing Trust Fund Pipeline Regulations - Comments**

Dear Mr. Cervantes:

Public Counsel is the public interest law firm of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. We represent a wide range of non-profit community development organizations, social service organizations, and individuals involved in the production and preservation of affordable housing in the City. Our activities include homelessness prevention and community development, which impact a wide spectrum of people who live at or below the poverty level.

Our firm has reviewed the draft Affordable Housing Trust Fund Pipeline Regulations, Policies, and Procedures ("AHTF Regulations"). We write to voice concerns about specific requirements that have been built into the AHTF Regulations: (a) the requirement in subsection 2.7 that AHTF Pipeline applications include a Letter of Acknowledgement from the councilmember in whose district the development will be located in order to be considered for funding, and (b) the requirement in subsection 7.3 that project sponsors submit a Letter of Support from the council office in which the project is located in order to show "Project Readiness." These requirements (hereinafter, the "Letter Requirements") raise significant legal issues.

**Background and Introduction**

Section 2 of the AHTF Regulations lists "Threshold Requirements," which include a Letter of Acknowledgement from the councilmember in whose district the development will be located. Applications without this letter are "automatically rejected." Similarly, a Letter of Support from the council office in which the project is located is one of Section 7's requirements for "Project Readiness." This letter must be submitted for a project to proceed. By simply withholding either of these letters, a single councilmember would be vested with the ability to stop an entire project from moving forward in the AHTF Pipeline, preventing HCIDLA and the City Council from the opportunity to consider the project for funding. At the same time, the decision either to issue or withhold either of the Letters apparently can be made without the benefit of any objective standards or guidelines.

Much has been written about “not in my backyard” (“NIMBY”) opposition and stereotypes about a home’s intended residents resulting in denial of otherwise worthy affordable and supportive housing projects.<sup>1</sup> Such NIMBY opposition when injected into the political process is “often grounded on stereotypical assumptions about people with disabilities . . . . Moreover, once triggered, it is difficult to quell.”<sup>2</sup>

In the context of such opposition, the Letter Requirements compel individual councilmembers to issue or deny a letter on a project *without* the benefits of the vetting (and protections) that are built in to the City’s formal land use approvals process but *with* the type of informal NIMBY community input that Council offices tend to field. Without any guidelines in the AHTF Regulations to establish when a councilmember should or should not issue a letter, the Letter Requirements simply put the City at greater risk of claims of discrimination in connection with the decision to issue or not issue a Letter. The Letter Requirements also threaten to create an end run around protections established in the land use approval process to prohibit discrimination resulting from local opposition, putting up unnecessary barriers to otherwise worthy projects that could help the City meet its affordable and special needs housing goals set forth in its housing element. Indeed, a 50 state review of the low income housing tax credit (LIHTC) program found a “broad ‘chilling effect’” due to local approval requirements like letters from councilmembers, “so strong that it wholly discourages developers from even considering sites in certain areas . . . .”<sup>3</sup>

For these and other reasons set forth below, the Letter Requirements raise numerous concerns under local, state, and federal law.

**The AHTF Regulations conflict with state and federal laws governing the LIHTC program.**

The AHTF Regulations, with the City’s 9% LIHTC Pipeline Management Policies and Procedures, largely determine what local projects receive tax credits. The Mayor and City Council have selected HCIDLA as the sole entity authorized to issue local review letters required by the California Tax Credit Allocation Committee (CTCAC). The AHTF Regulations state that the City will only issue these letters with the City’s “Strong Support” to 9% LIHTC-seeking developments coming out of the AHTF Pipeline. Any developer who applies for 9% LIHTC outside the AHTF Pipeline will receive a Local Review Letter indicating “Strongly Oppose.”

The LIHTC program is governed by both state and federal law. Section 42 of the Internal Revenue Code ultimately governs the program, and requires a state housing credit agency to adopt a “qualified allocation plan” (“QAP”) for allocating credits among projects.<sup>4</sup> The California Health and Safety Code and the Revenue and Taxation Code establish the state’s LIHTC program

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<sup>1</sup> Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. Affordable Housing 78, 101 n.5, 105 n.14 (2002), available at <https://www.bazelon.org/LinkClick.aspx?fileticket=FZBvjKqK9hw%3D&tabid=241>.

<sup>2</sup> State of Cal., Office of the Attorney General, *Adoption of a Reasonable Accommodation Procedure* at 4 (May 15, 2001), available at [http://ag.ca.gov/civilrights/pdf/reasonab\\_1.pdf](http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf).

<sup>3</sup> Poverty & Race Research Action Council & Lawyers’ Comm. for Civil Rights Under Law, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program*, at 10-11 n.12 (2008).

<sup>4</sup> 26 U.S.C. § 42(m)(1).

and designate CTCAC as the state housing credit agency responsible for allocating the state's credits.<sup>5</sup> CTCAC has adopted regulations,<sup>6</sup> which serve as the state's QAP. The Internal Revenue Code requires that tax credits be allocated pursuant to the QAP.<sup>7</sup> None of these laws require a Letter of Acknowledgement or Letter of Support. In fact, as explained below, the Letter Requirements in the AHTF Regulations conflict with these laws and as a result, may be unenforceable.

Generally, local laws and regulations may not conflict with state or federal law and are "preempted," or void to the degree of any conflict.<sup>8</sup> Here, the AHTF Regulations require a letter of acknowledgement from a councilmember in the application even though the "Application Requirements" listed in the QAP fail to mention any letters from local councilmembers.<sup>9</sup> Critically, the "basic thresholds" for 9% LIHTC applications described in the QAP expressly state that "[a]n application *shall be determined to be complete* by demonstration of meeting the following basic threshold requirements, among other tests."<sup>10</sup> These requirements do not include any sort of letter of acknowledgement from a local councilmember. Therefore, by requiring a letter of acknowledgement and "automatically reject[ing]" applications without a letter, the AHTF Regulations conflict with the QAP, which requires an application to be determined complete if it meets the QAP's requirements, none of which include any sort of letter from a local councilmember.

Similarly, the AHTF Regulations require a Letter of Support from the local council office for a development to move forward in the AHTF Pipeline and receive tax credits. But no letter of support from a local councilmember is listed in the QAP's application selection criteria.<sup>11</sup> Moreover, the QAP requires that local reviewing agencies "perform evaluations of proposed project in its locale according to criteria set forth by the [Tax Credit Allocation] Committee," not local reviewing agencies like HCIDLA.<sup>12</sup> The AHTF Regulations' use of additional criteria—required to move forward in the AHTF Pipeline and receive tax credits—conflicts with the QAP.

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<sup>5</sup> See Cal. Health & Safety Code §§ 50199.4-50199.22; Cal. Rev. and Tax Code §§ 12205, 12206, 17057.5, 17058, 23610.4, 23610.5.

<sup>6</sup> Cal. Code Regs. tit. 4, §§ 10300-10358 (2014).

<sup>7</sup> 26 U.S.C. § 42(m)(1). See also Cal. Health & Safety Code § 50199.4(d).

<sup>8</sup> See U.S. Const. art. VI., cl. 2; Cal. Const. art. XI, § 7. A conflict exists between local and state law if the local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Viacom Outdoor, Inc. v City of Arcata*, 140 Cal. App. 4th 230, 236 (2006). For charter cities, an exception to state preemption applies to local laws related to "municipal affairs," though state law remains supreme for matters of statewide concern. *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 54 Cal. 4th 547, 552 (2012). Because the LIHTC program is established in federal law and requires administration by a state agency, the exception is unlikely to apply here.

<sup>9</sup> Cal. Code Regs. tit 4, § 10322 ("Application Requirements").

<sup>10</sup> *Id.* at § 10325(f) (emphasis added). "[A]mong other tests" refers to additional criteria included in subsection (g), which outlines additional requirements for specific housing types. None of these requirements include any sort of letter from local councilmembers.

<sup>11</sup> See *id.* at § 10325.

<sup>12</sup> *Id.* at § 10302(y).

### **The Letter Requirements conflict with California's Planning and Zoning Law.**

California's Planning and Zoning Law prohibits any city or local government from "impos[ing] different requirements on a residential development or emergency shelter that is subsidized, financed, insured, or otherwise assisted by the federal or state government or by a local public entity . . . than those imposed on nonassisted developments."<sup>13</sup> Because the Letter Requirements are not required by the LIHTC program—and in fact, may be prohibited for reasons described above—they cannot be deemed part of the funding process. Regardless, the Letter Requirements amount to additional requirements on developments that seek subsidies and financing from government sources, which are not imposed on nonassisted developments. These requirements are inconsistent with the Planning and Zoning Law.

In addition, the law also prohibits a city or local government agency from imposing different requirements on residential developments based on age, sex, race, or disability.<sup>14</sup> Affordable and supportive housing developments often provide homes to at-risk populations such as formerly incarcerated individuals, persons recovering from alcohol and substance abuse, and those with disabilities. Because assisted developments may disproportionately house these at-risk populations, implementation of the Letter Requirements may result in greater risk of claims of discrimination against projects based on the characteristics of the potential residents.

### **The Letter Requirements conflict with California's Housing Accountability Act.**

Under California's Housing Accountability Act, a local agency may not disapprove, or condition approval of an affordable housing project or shelter in a manner that renders the project infeasible, unless narrow conditions are met.<sup>15</sup> The Letter Requirements may lead to the types of decisions that the Housing Accountability Act aims to prevent. Developing affordable and supportive housing requires a mix of federal, state, and local funding. This funding is a prerequisite to an affordable housing project moving forward. The Letter Requirements allow the withholding of local support to prevent projects from ever reaching the land use entitlement stage, rendering these projects infeasible and threatening to create an end-run around the anti-discrimination protections engrained in the Housing Accountability Act.

### **The Letter Requirements impermissibly delegate authority to veto a project to a single councilmember without any objective standards.**

Legislative or discretionary powers or trusts devolved by charter or law on a council or governing body cannot generally be delegated to others.<sup>16</sup> And while administrative and ministerial functions may be delegated,<sup>17</sup> those exercises of delegated power must be guided by standards to ensure that any action taken will not be left to an official's uncontrolled discretion. Further, adjudicative decisions must be generally accompanied by a written set of findings.

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<sup>13</sup> Cal. Gov't Code § 65008(d)(1).

<sup>14</sup> *Id.* at § 65008(d)(2).

<sup>15</sup> *Id.* at § 65589.5.

<sup>16</sup> *Chamber of Commerce v. Stephens*, 212 Cal. 607, 610 (1931).

<sup>17</sup> *Schecter v. County of Los Angeles*, 258 Cal. App. 2d 391, 396-97 (1968).



The AHTF Regulations violate these principles governing delegation. The AHTF Regulations contain no guidelines or objective standards for when a Letter of Acknowledgement or Letter of Support should be issued. A single councilmember is required to issue or deny the Letter without providing any rationale or findings in connection with the decision. Moreover, because implementation of the Letter Requirements could result in individual applications being ineligible for consideration (e.g. if a Letter is not issued by a councilmember), these Requirements conflict with the requirement, elsewhere in the AHTF Regulations, that applications and recommendations be reviewed by the “full City Council.”<sup>18</sup>

#### **The Letter Requirements conflict with the City’s Housing Element.**

The state’s housing element law requires a local housing element to include an analysis of governmental constraints on the development of housing for all income levels and for persons with disabilities, as well as “demonstrate local efforts to remove governmental constraints.”<sup>19</sup> The Housing Element must also include an analysis of special housing needs, such as needs for persons with disabilities.<sup>20</sup> Because the AHTF Regulations build in an additional local government decision that could have the effect of blocking development of special needs housing – a decision that is not measured by any objective standards– the AHTF Regulations represent an additional governmental constraint.

Additionally, any ordinance that is inconsistent with the General Plan, which includes the Housing Element, is invalid when it is passed.<sup>21</sup> By imposing barriers to developing housing for affordable and special needs populations, the Letter of Acknowledgement requirement is inconsistent with several Policies, Objectives, and Programs in the Housing Element, including Objective 1.4, to “[p]romote an equitable distribution of affordable housing opportunities throughout the City,” and Objective 1.5, to “[r]educe regulatory and procedural barriers to the production and preservation of housing at all income levels and needs.”<sup>22</sup>

#### **The Letter Requirements complicate efforts to achieve fair housing goals.**

The federal Fair Housing Act (“FHA”) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin, and applies to decisions made by local governments,<sup>23</sup> including tax credit allocation and housing financing policies.<sup>24</sup> The Act prohibits practices with an unjustified discriminatory effect, including practices that perpetuate segregation, regardless of any intent to discriminate.<sup>25</sup> The Letter Requirements may invite violations of the

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<sup>18</sup> AHTF Regulations at § 4.5 (emphasis added).

<sup>19</sup> Cal. Gov’t Code § 65583(a)(5).

<sup>20</sup> *Id.* at § 65583(a)(7).

<sup>21</sup> *See id.* at § 65860(a); *Leshner Commc’ns v. Walnut Creek*, 52 Cal. 3d 531, 541 (1990).

<sup>22</sup> L.A. Dep’t of City Planning, *Housing Element 2013-2021*, at 6-50, 6-52 (2013).

<sup>23</sup> 42 U.S.C. § 3604.

<sup>24</sup> *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486 (N.D. Tex. 2010).

<sup>25</sup> In February, 2013 this interpretation was codified in a final rule, which states that “[l]iability may be established under the Fair Housing Act based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.” 24 C.F.R. § 100.500 (2014). The rule stipulates that “a



FHA by helping to create an environment where it is more difficult for developers to finance and develop affordable and supportive housing in certain parts of the City.<sup>26</sup> For example, if a councilmember refuses to cooperate with a developer's funding application in the context of local opposition to housing for people with disabilities, such refusal could constitute illegal interference under the FHA and other laws.

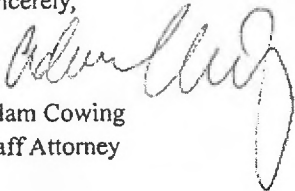
The Letter Requirements also implicate the City's duty to affirmatively further fair housing. As a recipient of federal funding, the City has a duty to affirmatively further fair housing through the AHTF Pipeline. To comply with this obligation, the City must truthfully certify that it has or will "conduct an analysis of impediments to fair housing choice within the area, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard."<sup>27</sup> The Department of Housing and Urban Development's Fair Housing Planning Guide provides guidance on this duty, and defines an impediment to fair housing to include community resistance to low-income housing and housing for people with disabilities.<sup>28</sup> As described above, the Letter Requirements create impediments to fair housing choice, and the City has not taken action to overcome these impediments, in conflict with its duty to affirmatively further fair housing.

The Letter Requirements also effectively represent an end run around the Brown Act, which ensures that public decisions be made openly and that deliberations be conducted openly. By vesting the power to effectively deny an application for public funding in a single councilmember, the perhaps unintended effect is that that portion of the decision making process has been removed from the public eye.

For all of these reasons, we urge the City to reconsider the Letter Requirements in the AHTF Regulations and ensure that these requirements do not act as a barrier to the City's efforts to meet its affordable and special needs housing goals. We also welcome the opportunity to discuss these concerns with HCIDLA and other City officials.

Thank you for considering these comments.

Sincerely,

  
Adam Cowing  
Staff Attorney

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practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." *Id.* at § 100.500(a).

<sup>26</sup> The Letter Requirements may also invite violations of the California Fair Employment and Housing Act ("FEHA"), which expressly states that its protections are at least as extensive as the FHA and its implementing regulations. Cal. Gov't Code § 12955.6.

<sup>27</sup> 24 C.F.R. § 91.425(a)(1)(i).

<sup>28</sup> U.S. Dep't of Hous. and Urban Dev., *Fair Housing Planning Guide*, at 2-17 (1996).