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ACLU
ROGER BALDWIN FOUNDATION OF ACLU, INC.

February 21, 2013

BY U.S. MAIL AND EMAIL

Chicago Housing Authority
Attention: Washington Park – Shops and Lofts at 47
60 East Van Buren Street, 12th Floor
Chicago, Illinois 60605
Email: CommentOnThePlan@theCHA.org

Re: Public comments to the CHA from the ACLU of Illinois regarding the proposed mandatory suspicionless drug testing policy at the Shops and Lofts at 47 mixed-income development

To the Chicago Housing Authority:

On behalf of the ACLU of Illinois, I write to respectfully urge the Chicago Housing Authority ("CHA") not to approve a policy of mandatory suspicionless drug testing of CHA residents at the Shops and Lofts at 47 mixed-income housing development, as proposed in the draft Tenant Selection Plan and draft Residential Lease Agreement.

I. The proposed policy

Shops and Lofts at 47 is a mixed-income housing development at 47th Street and Cottage Grove Avenue in Chicago's south side. It will include CHA public housing units. It also will include units rented at market price, and non-CHA units rented below market price. Further, it will contain retail space.[1]

Under the proposed Tenant Selection Plan (at page 11) and the proposed Residential Lease Agreement (at pages 11 and 15), all applicants to and residents of this housing development who are 18 years or older – including CHA residents and applicants – must take and pass a drug test as a condition of residency.[2]

[1] *See* http://www.cityofchicago.org/content/dam/city/depts/dcd/tif/T_047_Shops_and_Lofts_47CDC.pdf.

[2] *See* http://www.thecha.org/pages/proposed_policies_out_for_public_comment/39.php.

II. The ACLU's interest in the proposed policy

The ACLU of Illinois is a non-profit, non-partisan, statewide organization with more than 20,000 members and supporters in Illinois – including more than 10,000 in Chicago – dedicated to protecting and expanding the civil rights and civil liberties guaranteed by the U.S. and Illinois Constitutions and civil rights laws.

The ACLU has long supported personal privacy and bodily autonomy, including freedom from mandatory suspicionless drug testing. For many years, the ACLU has investigated and advocated against such testing of CHA residents. For example:

- On February 26, 2003, the ACLU testified at a meeting of the CHA Board of Commissioners against the approval of a policy of mandatory suspicionless drug testing at the Lake Park Crescent mixed-income development. Unfortunately, the CHA approved this policy.

- On June 3, 2011, the ACLU testified at a CHA meeting against a proposed policy of mandatory suspicionless drug testing of all CHA residents. Fortunately, the CHA did not approve this policy.

- On June 1, 2011, the ACLU sent the CHA a request pursuant to the Illinois Freedom of Information Act ("FOIA") for records regarding CHA-approved policies of mandatory suspicionless drug testing at mixed-income developments. This FOIA request yielded information discussed below.

- On November 15, 2011, the ACLU sent the CHA a letter asking it to end its approval of all policies of mandatory suspicionless drug testing at mixed-income developments. Unfortunatley, the CHA did not do so.

- On January 18, 2013, the ACLU moved to file an *amicus curiae* brief in the eviction proceeding *Oakwood Shores LLC v. Bloodsaw*, No. 2011-M1-721540 (Cook County Circuit Court). There, a CHA resident faced eviction because a member of her household allegedly violated a CHA-approved policy of mandatory suspicionless drug testing. The ACLU's brief argued that the proposed eviction would violate the privacy guarantees of the U.S. and Illinois Constitutions. On February 5, 2013, the court allowed the ACLU to file its brief. The court found that the CHA resident had not violated the CHA-approved policy, and thus did not address the constitutional issues.

III. The ACLU's policy objections to the proposed policy

First, the proposed policy of mandatory suspicionless drug testing would invade privacy and bodily autonomy. The policy would take away a part of someone's body, and then scrutinize it for evidence to use against them. Moreover, drug testing by means of urinalysis is humiliating for many people.

Second, the proposed policy would create a stigmatizing, unfair, and irrational double standard. If approved by CHA, the policy would comprise a public declaration by municipal government that CHA residents (and other renters) at this mixed-income housing development are substantially more likely to use and abuse illegal drugs, compared to the general public. Three-quarters of the residents at the Shops and Lofts development will have lower incomes. Residents are presumed guilty of drug use and abuse, until proven innocent by means of an annual mandatory suspicionless drug test. Meanwhile, tens of millions of middle class home owners and renters throughout our nation, including in Chicago, enjoy many very expensive government subsidies of their homes, such as tax deductions for home mortgage interest – and they are not first subjected to suspicionless drug testing.

There is no factual basis for this double standard. Indeed, a significant body of research demonstrates that low income persons do not use or abuse illegal drugs more than persons in other income groups. For example:

- According to a study by the U.S. government: "Proportions of welfare recipients using, abusing, or dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare . . . ." *See* U.S. National Institutes of Health, *NIAAA Researchers estimate alcohol and drug use, abuse, and dependence among welfare recipients* (Oct. 23, 1996).[3]

- The CHA documents obtained by the ACLU pursuant to FOIA (attached hereto as Exhibit 1) demonstrate the following: In September 2011, six mixed-income housing developments had CHA-approved mandatory suspicionless drug testing policies. At that time, these developments housed 1,589 CHA residents who were age 18 or older, all of whom were subject to the testing policy. As of that time, and inclusive of all years of testing, only 51 of these CHA residents had tested positive for drugs. This shows that very few adult CHA residents at these mixed-income developments use or abuse drugs. If all 51 of those positive tests had occurred in one year, that would yield a positive test rate of less than 4%. Of course, the actual annual positive test rate is much lower, because these 51 positive tests occurred over multiple years.

- A Florida study, credited by a federal court in a drug testing case, found that only 5% of public aid applicants tested positive for drugs, compared to another study estimating that 8% of the general public used drugs. *See Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1277-78 (M.D. Fla. 2011).

Third, mandatory suspicionless drug testing misallocates scarce resources. Urinalysis often costs some $50 per test. With a tested population of some 1,500 adult CHA residents in mixed-income developments, the total annual cost is some $75,000. That sum would be better spent on building security, drug treatment, or other improvements to the housing.

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[3] *See* http://www.niaaa.nih.gov/NewsEvents/NewsReleases/Pages/welfare.aspx.

Fourth, there are far more effective ways than mandatory suspicionless drug testing to advance safety and order at mixed-income housing developments. Non-resident law breakers can be removed pursuant to trespass rules. Drug dealers can be arrested and prosecuted by means of traditional police techniques such as controlled purchase stings. Destructive or disruptive residents can be evicted for cause. Drug testing of residents might be required where there is individualized suspicion of illegal drug use.

There also are far more effective ways to identify and treat drug addiction, including voluntary questionnaires, and improved access to immediate and free addiction treatment. Indeed, in two lawsuits challenging mandatory suspicionless drug testing of applicants for cash public aid, many leading drug abuse and addiction treatment and research organizations filed *amici curiae* briefs against such policies. They argued that these policies do not advance treatment because: they fail to distinguish drug use from drug abuse and addiction; they deter needy people from seeking government aid; poor people seeking government aid are not more likely than other people to use or abuse drugs; and alternative, less-invasive methods are more effective.[4]

IV. The ACLU's legal objections to the proposed policy

Mandatory drug tests are searches under the Fourth Amendment to the U.S. Constitution. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 313 (1997). The Fourth Amendment protects public housing residents from suspicionless searches by public housing authorities. *See, e.g., Pratt v. CHA*, 848 F. Supp. 792 (N.D. Ill. 1994) (striking down suspicionless searches for weapons in the homes of CHA residents). The drug testing policy proposed here, as applied to CHA residents, would plainly comprise state action by the CHA subject to Fourth Amendment scrutiny. Most importantly, the proposed policy could not be applied to CHA units without the CHA's approval.

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. . . . But particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal need for law enforcement. . . . When such special needs . . . are alleged . . . , courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 313.

Here, the "special needs" balancing weighs heavily against the proposed policy. Mandatory suspicionless drug testing by means of urinalysis greatly invades privacy. *See, e.g., Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (for some people monitored urination is "seriously embarrass[ing]" and not a "negligible" privacy invasion); *Taylor v. O'Grady*, 888 F.2d 1189, 1197-98 (7th Cir. 1989) ("[a]ll urinalysis programs

[4] The *Marchwinski* amici include the American Public Health Association, the National Association of Social Workers, the National Association of Alcoholism and Drug Abuse Counselors, the American College of Obstetricians and Gynecologists, the National Council on Alcoholism and Drug Dependence, the Association of Maternal and Child Health Programs, the National Association on Alcohol, Drugs and Disability, and the National Black Women's Health Project. The *Lebron* amici include the American Academy of Addiction Psychiatry, and National Advocates for Pregnant Women. *See* http://www.aclu.org/files/FilesPDFs/marchwinskiamicusbrief1_22_01.pdf; http://www.aclufl.org/Lebron/ACLU-LebronAmici-AAAPetal.pdf.

implicate serious privacy concerns," because monitored urination "is intrusive and often embarrassing and uncomfortable").

CHA residents do not have a diminished expectation of privacy, compared to the general population. They are just like the tens of millions of other people who live in rental property in exchange for paying rent and behaving lawfully. They are adults, they have broken no laws, and they are not engaged in dangerous activities that can directly harm other people. In this regard, CHA residents in mixed-income developments are fundamentally unlike the narrow classes of people that have been found by courts to have a diminished expectation of privacy for purposes of suspicionless drug testing. *Skinner v. RLEA*, 489 U.S. 602 (1989) (train operators); *NTEU v. Von Raab*, 489 U.S. 656 (1989) (armed drug interdiction personnel); *Earls*, 536 U.S. 822 (children in public school custody); *Bates v. Davis*, 116 Fed. Appx. 756 (7th Cir. 2004) (inmates in prison custody).

On the other side of the scale, no legitimate government interests are advanced by mandatory suspicionless drug testing of CHA residents at mixed-income developments. As discussed above, there are far better ways to ensure safety and order, and to identify and treat addiction. Inasmuch as a purpose of this testing is to reassure market rate renters that other renters are not using drugs, the available data shows that poor people generally and CHA residents in particular do not use drugs more than anyone else, and government cannot burden one group based on the unfounded biases of another group. *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (holding that restrictive government zoning of group homes for persons with developmental disabilities, enacted in response to the "irrational prejudice" of neighbors, failed low-level rationality review under the Equal Protection Clause).

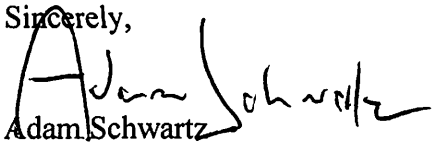
While the "special needs" balancing is highly fact specific, it bears emphasis that two courts have struck down mandatory suspicionless drug testing of poor persons seeking cash public aid. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *aff'd*, 60 Fed. Appx. 601 (6th Cir. 2003) (en banc). Other courts have struck down drug testing of many other groups. *See, e.g., Chandler*, 520 U.S. 305 (candidates for elected office); *Taylor*, 888 F.2d 1189 (jail employees without access to inmates or firearms); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (library clerks); *AFT v. Kanawha Bd. of Educ.*, 592 F. Supp. 2d 883 (S.D.W.V. 2009) (teachers).

Finally, the Privacy Clause of the Illinois Constitution (Article I, Section 6) is even more protective of personal privacy than the Fourth Amendment to the U.S. Constitution, and it squarely protects people from (among other things) invasions of their bodily autonomy for purposes of gathering derogatory information about them. *See, e.g., In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381 (1992) (requiring probable cause for a grand jury to seize head or pubic hair from a suspect, and individualized suspicion for it to seize thumb prints).

* * *

Thank you for considering the public comments of the ACLU of Illinois, urging the CHA not to approve the proposed policy of suspicionless mandatory drug testing of CHA residents at the Shops and Lofts at 47 mixed-income development. If you have any questions, please do not hesitate to call me at (312) 201-9740, extension 316, or to email me at aschwartz@aclu-il.org

Sincerely,



Adam Schwartz
Senior Staff Counsel

cc: Zaldwaynaka Scott, Chair of the Board of Commissioners
Deverra Beverly, Commissioner
Adela Cepeda, Commissioner
Mark Cozzi, Commissioner
Dr. Mildred Harris, Commissioner
Harriet Johnson, Commissioner
Myra King, Commissioner
John G. Markowski, Commissioner
M. Bridget Reidy, Commissioner
Rodrigo A. Sierra, Commissioner
Charles Woodyard, Chief Executive Officer
Scott W. Ammarell, General Counsel

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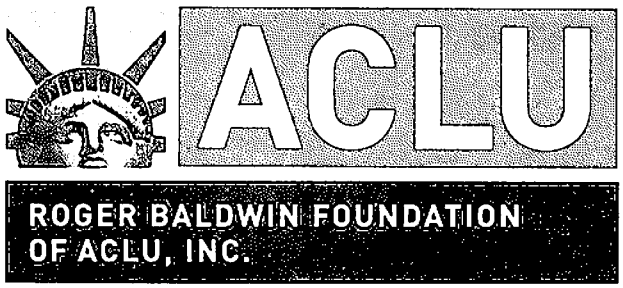

November 1, 2011

VIA U.S. Mail and EMAIL to: FOIArequest@thecha.org

Nathaniel Tortora
Research, Reporting and Communications
Chicago Housing Authority
60 East Van Buren St., 10th Floor
Chicago, IL 60605

Re: FOIA request, nos. 11-069L and 11-119L

Dear Mr. Tortora:

Thank you for speaking with me this morning. I've attached my correspondence of October 14, 2011, which we discussed. Thank you for confirming that both of the charts, attached as Exhibit A and B to my letter, only show data for CHA residents, and not non-CHA residents, at the mixed income communities.

Sincerely,

Karen Sheley
Staff Counsel

EXHIBIT 1

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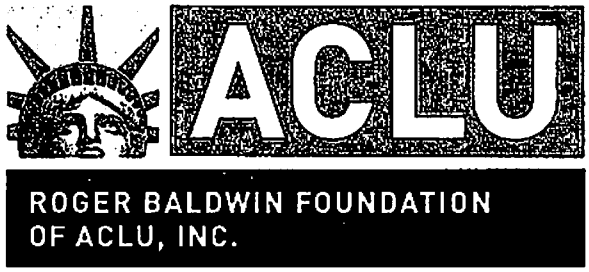

October 14, 2011

VIA U.S. Mail and EMAIL to: FOIArequest@thecha.org

Nathaniel Tortora
Research, Reporting and Communications
Chicago Housing Authority
60 East Van Buren St., 10th Floor
Chicago, IL 60605

Re: FOIA request, nos. 11-069L and 11-119L

Dear Mr. Tortora:

Thank you for speaking with me this afternoon. I am writing to confirm that that the CHA chart (Att. A), which you disclosed in response to our first FOIA request of June 1, 2011, covers the entire time that the drug testing policies have been in effect at the CHA mixed income communities. In our conversation, you also explained that the CHA chart (Att. B) which you provided in response to our FOIA request of September 14, 2011 shows the total number of residents who are 18 and older in each development as of September 2011 and that the date range indicates a search by birth year of residents.

If you disagree with any portion of this, or have any questions, please call me at 312-201-9740 ext. 325.

Yours truly,

Karen Sheley
Staff Counsel

Development	# Sites	Positive Tests	Households Evicted
Legends South	4	9	0
Hilliard Homes	4	20	0
North Town Village	2	10	0
Oakwood Shores	5	7	0
Parkside	2	5	0
Lake Park Crescent	1	0	0
TOTAL	18	51	0

EXHIBIT
A

Development	# Sites	1900-1993
Legends South	4	383
Hilliard Homes	4	427
North Town Village	2	118
Oakwood Shores	4	385
Parkside	2	191
Lake Park Crescent	1	85

EXHIBIT
B