

February 21, 2017

Office of Public and Indian Housing – RAD Program
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 2000
Washington, DC 20410

Re: Comments related to PIH 2012-32 (HA) H-2017-03, REV-3: Rental Assistance
Demonstration – Final Implementation, Revision 3

To Whom it May Concern:

The Council of Large Public Housing Authorities (“CLPHA”), the RAD Collaborative, and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments on the Rental Assistance Demonstration – Final Implementation, Revision 3 Notice.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (“PHAs”) own and manage nearly half of the nation’s public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

The RAD Collaborative, organized by CLPHA with the support of the National Equity Fund (“NEF”), HAI Group, Reno & Cavanaugh, and CF Housing Group, consists of interested Public Housing Authorities and their partners using the Rental Assistance Demonstration (“RAD”) to preserve and revitalize their public housing properties. Through an open system, the RAD Collaborative facilitates communication, information sharing and productive relationships among Housing Authorities, their residents and development and financing partners, advisors and transactional service providers, local government, policy makers and other stakeholders working to implement RAD across the country.

Reno & Cavanaugh represents more than one hundred PHAs throughout the country and has been working with our clients on public housing development and operations issues since its inception. Reno & Cavanaugh was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

On behalf of CLPHA, the RAD Collaborative, and Reno & Cavanaugh, we thank you for the opportunity to comment on the Rental Assistance Demonstration – Final Implementation, Revision 3 Notice (the “Notice”). We appreciate HUD’s efforts to simplify RAD and provide additional flexibility to PHAs seeking to utilize the RAD program. Though we have detailed our concerns below, we believe the Notice will be helpful to public housing authorities (“PHAs”) and other RAD program participants. We applaud HUD for addressing these critical implementation issues so that PHAs and other practitioners can continue to build upon the success of the RAD program and we encourage HUD to consider our additional comments and continue to streamline RAD requirements for the benefit of practitioners and residents.

At HUD’s request, we offer the following comments.

- HOPE VI Projects (Section 1.3.H): We recognize and appreciate the added flexibility that HUD is willing to provide to HOPE VI Projects developed in phases; however, the requirement that such sites be contiguous is inconsistent with HOPE VI principles. The HOPE VI program permitted replacement housing to be constructed within a three-mile radius of the to-be-revitalized development. As a result, many HOPE VI projects developed in phases have non-contiguous replacement housing that is part of one planned redevelopment. HUD has not provided a reason to treat non-contiguous HOPE VI replacement housing differently from contiguous HOPE VI replacement housing. This difference could result in off-site housing being ineligible for conversion, and thus severed from the unified plan development and implemented by the PHA. As such, we urge HUD to apply the earliest Date of Funding Availability (“DOFA”) to all HOPE VI projects developed in phases, regardless of whether such phases were constructed on a contiguous or non-contiguous site. In addition, we support the comments regarding contiguity in the comments submitted by the National Housing and Rehabilitation Association (“NH&RA”).
- Application Requirements (Section 1.9) – Submission of Letter of Interest When a Waiting List Has Formed; Selection Criteria (Section 1.11): We applaud HUD for lowering the barrier to entry for PHAs wishing to join the RAD waiting list and believe that the revised Notice’s requirement that a PHA need only submit a signed letter of interest to be added to the RAD Waiting List will be a great benefit to the many PHAs interested in RAD. However, we note that such a change to the waiting list process, coupled with a reduction in waiting list priority categories, raises many unanswered questions regarding how the waiting list process will be administered – especially for projects that may initially enter under the Second Priority Category and may wish to later be elevated to the First Priority Category, or vice versa. We encourage HUD to establish a formalized process by which applications may easily move from the Second Priority Category to the First Priority Category and retain the submission date of their original

Letter of Interest instead of requiring such transferred applications to start at the bottom of the First Priority Category.

In addition to the aforementioned concerns, we offer the following comments as they relate to RAD implementation and practice under the Notice.

- **Affordable Housing Purposes Definition:** The newly-added definition of “Affordable Housing Purposes” in the Notice formalizes the definition of affordable housing purposes previously found in the text of the Notice, but with one significant change – limiting it to housing serving families with incomes of 80% or less of Area Median Income (“AMI”). We believe that in this context “affordable housing” should also encompass workforce housing, which includes families slightly above that range, and we urge HUD to consider a less restrictive definition that would enable the use of proceeds to develop workforce housing in connection with low-income housing. Further, we think HUD should allow local PHAs to determine their own definitions of “Affordable Housing Purposes” based on locally-determined criteria, subject with their State’s public housing enabling act.
- **Ownership and Control (Section 1.4.A.11):** While we applaud HUD’s effort to provide additional clarity and detail regarding the acceptable forms in which a public or non-profit entity can demonstrate ownership or control, we seek additional clarification on the definition of “affiliate” as used in this section. When discussing how control requirements may be satisfied, the Notice uses the phrase “directly or through a wholly owned affiliate” and includes an accompanying footnote. However, it is unclear what is meant by this language: “An affiliate includes a PHA affiliate as defined in 24 CFR 905.604, but does not include a PHA instrumentality as defined at 24 CFR 905.604.” We do not think that the footnote clarifies the definition of “affiliate” in this context. We suggest that the Notice define “affiliate” rather than citing to other definitions that are partially applicable (e.g., affiliate in 24 CFR Part 905) or not applicable (e.g., instrumentality in 24 CFR Part 905). In real estate documents, for example, affiliate generally has a definition that defines a certain minimum threshold of relationship that “counts.” For example, the language used in real estate documents might define the terms “affiliate” and “control” as follows,
 - **Affiliate:** The term “**Affiliate**” as used in this Agreement shall mean, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls, or is Controlled by, or is under common Control with the Person specified.
 - **Control:** The term “**Control**” as used in this Agreement shall mean the possession, directly or indirectly, of the power to direct or cause the

direction of the management or policies of a Person whether through the ability to exercise voting power, by contract or otherwise. “Controlling” and “Controlled” shall have meaning correlative thereto.

We encourage HUD to similarly define the term “Affiliate” as it is generally understood and as applies under the RAD context rather than rely on partially or inapplicable preexisting definitions that exist elsewhere.

- Lead-Based Paint Hazards (Section 1.4.A.15): We fully support the enforcement of existing regulations and requirements designed to abate lead-based paint hazards. However, the language HUD uses in describing these regulations and requirements is verbose, and includes some but not all requirements (most notably, it does not note that elderly/disabled housing and single-room occupancy units are exempt in accordance with the 24 CFR Part 35.115 regulations). In its place, we encourage HUD to use simpler but still complete “Lead Based Paint Requirements” language used in other contexts. One example follows.¹
 - When providing housing assistance funding for purchase, lease, support services, operation, or work that may disturb painted surfaces, of pre-1978 housing, [PHAs] must comply with the lead-based paint evaluation and hazard reduction requirements of HUD’s lead-based paint rules (Lead Disclosure; and Lead Safe Housing (24 CFR part 35)), and EPA’s lead-based paint rules (e.g., Repair, Renovation and Painting; Pre-Renovation Education; and Lead Training and Certification (40 CFR part 745)).

This Notice of Funding Availability (“NOFA”) language imports the same lead-based paint requirements that HUD currently describes in the Notice, but, we believe, does so in a more clear and concise manner.

- Capital Needs Assessment (“CNA”) and Transition to CNA eTool (Section 1.4.A.1): The new CNA e-Tool was released on January 15, 2017, and it is still in beta testing with the industry. Mandatory use of the new CNA eTool by the Multi-family industry is not required until July 1, 2017. We strongly recommend that the switch to using the new CNA eTool by RAD applicants be tied to the date for the Tool’s mandatory use in the industry, plus six (6) months. In short we recommend that PHAs be allowed to use the RPCA for deals that will reach Financing Plan before January 17, 2018 and that the CNA

¹ See, for example, the 2015 Notice of Funding Availability for the Self-Help Homeownership Opportunity Program (SHOP), FR-5009-N-19. See also, the 2016 Notice of Funding Availability for the Capacity Building for Community Development and Affordable Housing Grants (Section 4), FR-6000-N-07.

eTool be used for RAD transactions reaching Financing Plan after January 17, 2018. This would eliminate confusion in translating one tool to the other and gives PHAs a more definitive date for planning purposes.

- Current PHA Employees (Section 1.4.A.16): We applaud efforts made by PHAs to work with developers, property managers, and others to find employment for current PHA employees whose positions may be eliminated or altered as a result of the RAD conversion. However, this is fundamentally a local government matter, so we believe the Notice should be silent on this point and defer to PHAs and their partners based on local needs and plans.
- Debt Financing (Section 1.4.B.1): The current Notice requires that permanent debt financing not have a balloon payment until after “the earlier to occur of a) expiration of the term of the HAP Contract or b) 17 years from the date of the permanent debt financing.” PHAs and their partners may seek longer terms before requiring a balloon payment to become due; however, a fifteen (15) year term (starting at stabilization) is common in the industry. A seventeen (17) year requirement would prevent PHAs from accessing these loan products, limit options, and perhaps increase borrowing costs.
- Acquisition Proceeds (Section 1.4.B.7): The Notice requires that all acquisition proceeds be used for “Affordable Housing Purposes” as provided by the Notice. We strongly disagree with this requirement since such a restriction is not required by the RAD statute and is inconsistent with HUD’s previous position that RAD offered PHAs a way to access the value of their public housing properties. The language contained in the Notice seems to broadly track the requirements imposed on Section 18 dispositions, which we do not believe to be the intent of RAD. Instead, acquisition proceeds should only to be subject to those restrictions imposed by the PHA’s state enabling act, which generally include similar limitations.

Additionally, it is important for HUD to be clear that the term “escrow” in this context may mean a bank account subject to a General Depository Agreement (“GDA”), whether or not the agreement is new or existing. An actual escrow arrangement, with a formal escrow agreement, escrow agent, and annual fees is unnecessary and expensive given the intended purpose of simply segregating funds to ensure appropriate use.

- Use of Public Housing Program Funds to Support Conversion (Section 1.5.A) – Conversion of all ACC Units: Creation of a reserve to cover public housing closeout costs is a welcome change. Currently, PHAs typically retain a small amount of public housing funds after the final project converts to allow it to “wrap up” the public housing

program. Without some change, unused funds will be returned to the U.S. Treasury and lost to affordable housing uses.

However, investors and lenders involved in a transaction may interpret the term “reserve” to refer to reserves they control in privately-financed debt or equity transactions. This could unduly restrict a PHA’s closeout efforts. Thus, we suggest that HUD clarify that closeout reserves need not be transferred to a “Transferee” under the RAD Conversion Commitment for a Covered Project, and instead permit a separate reserve held by the PHA.

- No Rescreening of Tenants upon Conversion (Sections 1.6.C.1 and 1.7.B.1): As you know, the RAD program permits any current tenant of a Converting Project to occupy a RAD unit in a Covered Project without being subject to any rescreening or income eligibility requirements. The Notice extends the rescreening prohibition to public housing residents of the Converting Project who elect to reside in standard (non-RAD) project-based voucher (“PBV”) or project-based rental assistance (“PBRA”) units in the Converted Project. We encourage HUD to provide trainings, issue FAQs, and further clarify the scope and extent of the RAD protections that will apply to non-RAD PBV or non-RAD PBRA returning residents.
- When Total Tenant Payment Exceeds Gross Rent (Sections 1.6.C.10 and 1.7.B.9): We agree with HUD’s revisions, which appear to make RAD requirements consistent with LIHTC requirements. However, we think HUD should provide a clarification on what the TTP will be when the RAD unit is not also a LIHTC unit. Under the RAD Notice currently, we understand that to be 30% of adjusted income regardless of the HAP Contract Rent
- RAD Rehab Assistance Payments (Section 1.7.A.9): We appreciate the clarifications and also think it would be helpful if HUD added a clarifying statement that RAD Rehab Assistance Payments may be accumulated and contributed as a loan for redevelopment costs.
- Application Requirements (Section 1.9) – Applications for Multi-Phase Development: The Notice requires that projects submitted under a multi-phase award application be either: (1) one contiguous site, or (2) a single AMP. As discussed in connection with HOPE VI Projects, we object to the requirement that such sites be contiguous unless the term is interpreted broadly. Multi-phase development comes in a variety of forms and, based on the topography of a given area, may or may not always be *literally* contiguous. For example, projects to be redeveloped in phases may be divided by streets, walkways, parks, etc. and may be *functionally* contiguous while literally separated by small areas.

We do not believe it is HUD's intent to exclude such applications for conversion to RAD as a multi-phase development; however, as written, such properties would be excluded from applying if taken *literally*. We request clarification that the term "contiguous" is interpreted broadly to permit otherwise worthy multi-phase projects separated by minor deviations in the topography of a given area.

- Developer Fee (Section 1.14): We are disappointed to see the Notice place additional limitations on the developer fees that may be earned. We believe that the language previously used in Revision Two of the Notice appropriately limited developer fees to the allocating agency's limitations, subject to a cap of 15% absent HUD approval. The Notice now requires a complex formula that limits developer fees to the greater of two alternatives: (1) fifteen (15) percent of the total development cost less acquisition payments made to the PHA, developer fee and reserves; or (2) the lesser of \$1,000,000 or fifteen (15) percent of the total development costs without offset for acquisition payments made to the PHA, developer fee and reserves.

The first alternative limits the paid portion of the developer fee to 15 percent, but excludes acquisition payments (in addition to developer fee and reserves, which we do not object to) from that calculation. We believe that acquisition payments should not serve as a reduction of paid fee. To the extent the PHA can recognize the value of its land and the fee can still be paid, it seems to us that the demonstration has been successful and we should not create rules against that success. The second prong limits the paid fee to the lower of \$1,000,000 or fifteen (15) percent without any offset. Again, we do not agree with this calculation as static limitations on fees fail to adequately account for differences in deal sizes and serve to disincentive larger deals that can be far more efficient. Finally, we think that subsidy layering reviews already protect against excess uses of federal funds, and this new limitation is not necessary.

Thank you for the opportunity to provide comments on the Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,



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