

The Public Housing Capital Plan: Basic Information for Advocates¹

For years, the United States Department of Housing and Urban Development (HUD) has provided capital funding for modernization of federal public housing separate from the ongoing operating subsidy. From the late 1980s until the mid-1990s, this was known as the Comprehensive Improvement Assistance Program (CIAP). For a period of time in the mid-1990s for larger housing authorities, CIAP was replaced by the Comprehensive Grant Program (CGP).

In 1998, HUD replaced the CIAP and CGP programs with the Capital Fund. However, HUD has never issued the kind of detailed regulations or handbook provisions for this program that it did for the prior programs. While there are some limited but important provisions in the statute or regulations about the capital fund, many of the details are found in the Public and Indian Housing (PIH) Notices that HUD issues about what should be in the Public Housing Authority (PHA) Plan template.² HUD also continues to use a number of the forms designed for the prior programs and to carry over some of the old rules until they can be replaced by revised rules.³ These rules include the following:

- A public housing authority (PHA) may not use more than 10% of its annual grant for administrative costs.⁴
- Unless the PHA is a “high performer” (i.e., it has a high score through the Public Housing Assessment System (PHAS)), it may not use more than 20% of its annual grant for management improvements.⁵

¹This article was adopted virtually verbatim from training materials prepared by Mac McCreight of Greater Boston Legal Services.

²PHA Plan Template, Form HUD-50075 (July 2003), available at <http://www.hudclips.org>. In addition, the *Public Housing Agency [PHA] Plan, Desk Guide*, which is available at <http://www.hud.gov/offices/pih/pha/index.cfm>, contains guidance on the PHA’s application for capital funds.

³See, e.g., HUD, PHA PLAN, DESK GUIDE (2001) (provides that until the new capital fund rules are published, the regulations at 24 C.F.R. Part 968 remain in effect). See also Fiscal Year 2004 Capital Fund Grants Processing Notice, PIH 2004-15, ¶ 20 (Aug. 9, 2004).

⁴Instructions for Submitting Second Public Housing Agency (PHA) Plans for PHAs with Fiscal Years beginning on July 1, 2001 and Capital Performance and Evaluation Reporting Requirements for January and April 2001 PHAs, PIH 2001-4, ¶ II. D.8 (Jan. 19, 2001) (extended by PHA Plan Guidance; Further Streamlining of Small PHA Plans; Early Availability of Capital Formula Funding for Obligation; Extension of Notices PIH 99-33 (HA), PIH 99-51 (HA), PIH 2000-22 (HA), PIH 2000-36 (HA), PIH 2000-43 (HA) and PIH 2001-4 (HA), PIH 2001-26 (HA) (Aug. 2, 2001).

⁵PIH 2001-4, *supra* note 4. The regulations for PHAS are found at 24 C.F.R. Part 902 (2004). PHAs that are “high performers” under PHAS

- The PHA may budget initially up to 8% of its annual grant for contingencies; these are then rebudgeted within the annual statement for particular items and obligated.⁶

Moving to Work (MtW) PHAs may be subject to different rules. If different rules apply, they are most likely set forth in the terms of the MtW agreement. Attachment 1 to a recent HUD notice describes some of the variables and deadlines that are applicable to the capital fund for MtW PHAs.⁷

The Current Rules Regarding the Capital Fund

Eligible Activities under the Capital Fund

Under the law, HUD’s Capital Fund can be used for the following activities:⁸

- the development, financing, and modernization of public housing projects, including redesign, reconstruction, and reconfiguration of public housing sites and buildings (including accessibility requirements) and the development of mixed-finance projects;
- vacancy reduction;
- addressing deferred maintenance needs and the replacement of obsolete utility systems and dwelling equipment;
- planned code compliance;
- management improvements, including the establishment and initial operation of computer centers in and around public housing through a Neighborhood Networks initiative, for the purpose of enhancing the self-sufficiency, employability and economic self-reliance of public housing residents by providing them with onsite computer access and training resources;
- demolition and replacement;
- resident relocation;
- capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents and to improve resident participation;

get some special treatment from HUD; in addition to some rules being loosened, they are eligible for some small bonuses in capital funding, and to receive capital funds redistributed from other PHAs that have not fully used them. 24 C.F.R. §§ 905.10(j) and 905.120(c)(3) (2004). If the PHA is not a “high performer” under PHAS, advocates ought to urge the PHA to propose, in its new Five-Year Plan, to take steps to become a high performer. See PHA Plan Template, *supra* note 2 (“Goals” heading).

⁶PIH 2001-4, *supra* note 4.

⁷PIH 2004-15, *supra* note 3, at attachment 1.

⁸42 U.S.C.A. § 1437g(d)(1), (g)(1) (West 2003); 24 C.F.R. § 905.10(k) (2004).

- capital expenditures to improve the security and safety of residents;
- homeownership activities (where applicable).

In addition, all but small PHAs may use up to 20% of the Capital Funds allocated for a PHA in any year for operating expenses (which are usually covered by HUD's Operating Fund), but only if the PHA Plan provides for this.⁹ Small PHAs—those operating fewer than 250 public housing units—may use any of the capital funds for either operating or capital needs.¹⁰

Parts of the Capital Plan

There are basically four parts to the Capital Plan. Some of these have names which are similar to the overall PHA Plan, and this can cause confusion. Thus, there is an Annual Statement, but this is different than the PHA Annual Plan. There is also a Five-Year Action Plan, but this is different than the Five-Year Plan portion of the PHA Plan.

Annual Statement — This identifies capital activities the PHA is proposing for the upcoming year. One table sets forth a program-wide summary of budget categories. A second table identifies each development in which the PHA plans to conduct capital improvements and gives a brief description of the work planned, its estimated cost, and development account number. A third table identifies the estimated timetable for obligation (placing under contract) and expenditure (spending) for each activity; this is only required, however, if the timeline is expected to go beyond HUD's usual obligation and expenditure deadlines (eighteen months and thirty-six months, respectively).¹¹

Five-Year Action Plan — This was at first optional, but is now required. HUD considers that the Capital Fund Program Five-Year Action Plan “is one of the most important documents of a PHA.”¹² This plan must list any anticipated large capital items for the next five-year period by development name, development number, description of the item, estimated cost and planned start date, and total cost of all large capital items per development. “Large capital items” are any work items that are \$1 million or more or which would amount to 10% or more of

the PHA's annual Capital Fund grant. A PHA can choose to list smaller items, but need not list anything less than \$25,000. A PHA can also include information on the number of vacant units or percentage of vacancies at developments, but HUD doesn't require this.¹³ PHAs usually will want to list as many work items as necessary in the Five-Year Action Plan so that in case they need to switch the items being completed, there is no need to amend the PHA Plan through advance notice/comment by the Resident Advisory Board (RAB) and the public.¹⁴ The PHA can obligate capital funds for any activity in the Five-Year Action Plan.¹⁵ This plan is a “rolling” plan—each year's five-year plan picks up from the information in the prior plan, revises it as necessary, and adds another year.

Performance and Evaluation Reports — These reports, sometimes called P&Es, indicate how the PHA has obligated and spent capital funds that it received from HUD in the prior few years. The reports must include any year for which the PHA is still expending funds. These reports include any cost decreases or increases in the original estimated costs for work items.¹⁶ The RAB and local tenant organizations often need to have both the Performance and Evaluation Reports, the Annual Statement, and the Five-Year Action Plan and track them over time to find out what's happened with all of the funds for a particular development, or to compare what's happening across all of the PHA's developments. For example, a local tenant organization may remember that kitchen modernization was a priority item for the development at one point, and have to check the P&E reports to see if the work is currently planned or under contract, and check the Five-Year Action Plan to see if it has been shifted to a future year, or has been deleted altogether.

Replacement Housing Factor Funding — The Capital Plan also discusses how Replacement Housing Factor (RHF) funds are used by the PHA. RHF funds are received

⁹42 U.S.C.A. § 1437g(g)(1) (West 2003).

¹⁰*Id.* at § 1437g(g)(2).

¹¹Announcement of Availability of PHA Plan Template, Instructions and Supplemental Guidance on Preparation and Submission of PHA Plans on HUD Website; Announcement of Streamlining of Capital Fund and Public Housing Drug Elimination Program Planning Requirements, PIH 99-33, ¶ 4, component 7 (July 30, 1999) (extended by PIH 2001-26 (HA), *supra* note 4).

¹²PHA Plan Desk Guide, *supra* note 2, at ¶ 3.20.3.

¹³Additional Instructions for Submitting First PHA Plans under the Final Rule and Extension of Due Date for Submission of PHA Plans for PHAs with Fiscal Years Beginning January 1, 2000 and April 1, 2000; Guidance for PHAs with Fiscal Years Beginning July 1, 2000 and after; Availability of Required Format for Public Housing Drug Elimination Program (PHDEP) Plan, PIH 99-51, ¶ VI.B. component 7 (Dec. 14, 1999) (extended by PIH 2001-26 (HA), *supra* note 4). Information on the number of vacant units in a development is reported on the Physical Needs Assessment, Comprehensive Grant Program (CGP), HUD Form 52832 (Oct. 1996), which all but small PHAs are required to fill out. 24 C.F.R. § 968.315 (2004) (physical needs assessment to identify all work that a PHA would need to bring each development up to modernization standards must be completed without regard to the availability of funds.)

¹⁴PHA Plan Guidance; Streamlining of Small PHA Plans; Extension of Notices PIH 99-33 (HA) and PIH 99-51 (HA), PIH 2000-43, ¶ IV.D.1. (Sept. 18, 2000) (extended by PIH 2001-26 (HA), *supra* note 4). *See also* 24 C.F.R. § 968.305 (2003) (definition of fungibility).

¹⁵PIH 2004-15, *supra* note 3, at ¶ 11.

¹⁶PIH 2001-4, *supra* note 4, at ¶ II.D.3.

when the PHA has reduced the number of federal public housing units through disposition or demolition; this often happens, for example, through the HOPE VI process, where a PHA reduces the density of a public housing development. RHF funds are used to develop new affordable housing for low-income families (this is not necessarily public housing). In order to qualify for as much RHF funding as possible, PHAs must show that they are also obtaining a significant amount of other matched funds (for example, from the state, city or other sources). The PHA must describe what its plan is for creation of affordable housing; when sufficient funding is secured, it must meet HUD deadlines for obligating and spending funds, and must report on these expenditures. Not all PHAs have RHF funding.¹⁷

Obligation and Expenditure Deadlines for Capital Funds

A key issue for Capital Funds is making sure that they are obligated (placed under contract) and spent within the deadlines set by Congress and HUD.

Two-Year (Twenty-Four Month) Obligation of Funds Deadline; HUD Extensions — Under the law, a PHA must obligate capital funds within two years (twenty-four months) from the date on which the funds become available to it or, if it has to accumulate adequate funds to do the work, within twenty-four months of the date that it accumulates the funds. HUD may extend this deadline where it finds that there were barriers due to: litigation; obtaining necessary federal, state, or local government approvals; complying with environmental requirements; relocation of residents; or other events beyond the PHA's control. If the amount of unobligated funds is less than 10% of the original grant, HUD is to ignore this. HUD can also extend the time period by one year (twelve months) due to the size of the PHA, the complexity of its capital program, any limitations in timely obligation due to state or local law requirements, or other factors it may find important.¹⁸

Four-Year (Forty-Eight Month) Spending Deadline — Under the law, a PHA must spend any capital assistance not later than four years (plus the period of any extension approved by HUD) after the date on which the funds become available to the PHA for obligation.¹⁹

Penalties for Not Meeting Obligation and Spending Deadlines — There are stringent penalties for not obligating or spending capital funds on time. HUD cannot provide new assistance to the PHA, and must withhold funds that

would otherwise be provided. Funds not provided to the PHA are to be redistributed to high-performing PHAs. HUD can also recapture funds already provided to the PHA.²⁰

Strategies that PHAs Undertake to Avoid Missing Deadlines — Sometimes a PHA may be up against an obligation or spending deadline for reasons which are outside of its control. The work may be complex, or there may be unanticipated design or contract problems. Other items may have taken priority (for example, HUD may require a PHA to create more accessible units, which might mean that the PHA would have to put off other work that it had planned). There may be other work items which are not yet up against the deadline (i.e., they were originally funded in a later year) which are proceeding ahead of schedule. In order to avoid losing funding, a PHA may switch these work items, and say that the earlier year's funding is now being used to fund the later year work-item. These changes make sense, but the RAB should be informed so that it can be sure about what's going on, and that any work deferred to a later year is still going to be completed.

Some Practical Considerations in Working on the Capital Plan

Knowing What the Priorities/Needs Are at Each Development — This is a daunting task when the RAB has only a small number of members; public housing representatives on the RAB may know what the priorities/needs are at their development, but may not know what is needed elsewhere. This requires outreach, and getting local tenant organizations to share information. To determine the needs at particular developments, tenant organizations and advocates may also review the Physical Needs Assessment which all PHAs, except small PHAs, are required to fill out. The information provided on these forms is general but ought to include information on what is needed to bring the development up to modernization and energy conservation standards and replacement of equipment systems and structural elements.²¹

Keeping Track of the Money — This is a long-term research task. The RAB will want to know how money has been planned and spent over a long period of time, and how funding has been shifted. It may be, for example, that a particular development was originally slated for funds for particular needs, but those funds had to be reprogrammed. If that happened the question remains as to whether that work will be completed in the future.

Finding Out Why — There are many tables to track with

¹⁷See PIH 2004-15, *supra* note 3, at ¶ 19.

¹⁸42 U.S.C.A. §1437g(j)(1-2) (West 2003); 24 C.F.R. § 905.120(a-b) (2004). See also PIH 2004-15, *supra* note 3, at ¶ 14.

¹⁹42 U.S.C. § 1437g(j)(5) (West 2003); 24 C.F.R. § 905.120(d) (2004).

²⁰42 U.S.C.A. § 1437g(j)(3, 5-6) (West 2003); 24 C.F.R. § 905.120 (c) and (e) (2004). See also PIH 2004-15, *supra* note 3.

²¹HUD Form 52832, *supra* note 13.

many numbers. If the PHA is planning on prioritizing projects in a particular way, or changing how money has been planned for in the past, the RAB needs to find out why. Often there are good reasons—but sometimes there are situations that need more discussion, and where the RAB may have different priorities.

Figuring Out a Way to be Fair — It is difficult, when dealing with Capital Funds, to figure out a way to be fair. The PHA does not get all of the funding it needs—just the funding that Congress and HUD decide to give out each year.²² This means that the PHA must often make tough choices. In addition, to do certain work—for example, to create enough accessible units to avoid suit by HUD, or to complete a HOPE VI redevelopment—the PHA may have to set aside substantial funds, and therefore will have less funding available for other projects. While some tenants might argue that each development should get similar capital funding (on a per-unit basis), the reality is that developments have very different capital needs, with some having systems that are wearing out and others with systems that could last another five to ten years. One way to approach this is to say that every development with a particular type of critical need—for example, roofs that are leaking—should get funding before developments that have a less critical need (for example, the need to modernize bathrooms). Reasonable people can differ on this approach and how the funds may be spent.

Balancing How Money Is Used—Operating and Capital Funds — As noted above, PHAs can use the Capital Fund for operating expenses. Congress and HUD have been underfunding the Operating Fund. In addition, some grants like the Public Housing Drug Elimination Program (PHDEP), have been eliminated, and PHAs with security needs have had to figure out other ways to meet security needs. But use of Capital Funds for operations may result in underfunding of Capital Needs. The balance between using the capital fund for operating costs and maintaining the capital fund for capital improvements has to be discussed. Residents and other interested parties should understand the consequences of the approach selected. ■

2004 HJN Meeting a Success

The twentieth National Meeting of the Housing Justice Network (HJN) took place on October 3 and 4, 2004, in the heart of Washington, D.C. The energized gathering drew nearly 200 housing attorneys and other advocates from across the country, including one attorney who made the nine-hour plane ride from Hawaii to attend.

The day before the meeting, NHLP conducted a one-day basic federal housing training which was geared primarily to new housing attorneys. The eight-hour training featured NHLP staff attorneys as well as four guest trainers: **Mona Tawatao**, of Legal Services of Northern California; **Larry McDonough**, of Mid-Minnesota Legal Services; **Linda Perle**, of the Center for Law and Social Policy; and **Mike Hanley**, of the Greater Upstate Law Project. More than ninety people were in attendance, and those who stayed for the two-day HJN Meeting reported that the training provided a solid foundation for the more in-depth HJN sessions.

The meeting featured two plenary sessions, a handful of working group meetings, a meet-and-greet reception, and twenty-eight informational workshops on topics encompassing the spectrum of low-income housing issues. Sessions covered HUD and rural preservation issues and strategies, fair housing litigation, Low Income Housing Tax Credit properties, budget issues, the voucher crisis, public housing rents, loss of public housing, environmental health and housing issues, community organizing, predatory lending, and much more. The two plenary sessions featured panel discussions on environmental health and housing and the future of HUD low-income housing programs.

The meeting also provides an opportunity to recognize excellence in the field, and to present exceptional advocates to an audience of peers and colleagues who have benefited from their work. NHLP gave out two awards at the October meeting: the David B. Bryson Memorial Award and the new Housing Justice Award.

Barbara Sard of the Center on Budget and Policy Priorities accepted the 2004 David B. Bryson Memorial Award, presented by **Anita Bryson** and **Barbara Samuels**. Recipients of the Bryson Award have demonstrated exemplary commitment to solving the housing problems of extremely low-income people, have been successful in a variety of forums, and are known for unwavering support of colleagues and others working in the legal services and housing advocacy communities. They have embodied the principles exemplified by David Bryson and carried on his legacy of stalwart and selfless pursuit of housing justice. Ms. Sard earned the award for her tireless work in the area of low-income housing policy and the extensive and exhaustive advocacy she has done in the wake of the increasingly fierce budget attacks on the beleaguered Housing Choice Voucher program.

²²See NHLP, *Proposed Cuts to Public Housing Remain Unresolved*, 34 HOUS. L. BULL. 199, 213 (2004).