

# HUD Issues Final Rule for the Demolition or Disposition of Public Housing

The Department of Housing and Urban Development (HUD) has published a final rule governing the demolition or disposition of public housing developments<sup>1</sup> that finally implements changes made to Section 18 of the Housing Act of 1937<sup>2</sup> by the Quality Housing and Work Responsibility Act of 1998 (QHWRA)<sup>3</sup>. The key statutory changes implemented by the new regulation:

- relieve HUD of the obligation to review and approve demolition applications, allowing it, instead, to approve such applications based on “truthful” certifications of relevant factors by public housing agencies (PHAs);
- eliminate the one-for-one replacement requirement for public housing units that are demolished or disposed;
- limit the opportunity of residents to purchase public housing developments slated for demolition;
- establish a *de minimis* exception to the requirement that PHAs secure HUD approval for all demolitions;
- authorize the consolidation of occupancy in buildings in order to improve living conditions; and
- eliminate the applicability of the Uniform Relocation Act (URA) to the demolition and disposition of public housing.<sup>4</sup>

The final rule makes several changes to the demolition and disposition rules as they were first proposed in 2004.<sup>5</sup> Some of those changes were recommended by members of the Housing Justice Network (HJN) when they commented on the proposed regulations.<sup>6</sup> Other HJN recommendations were ignored or rejected.

## Applicability of the New Rules

The final regulations limit the applicability of the new rules by exempting certain development types from their coverage. This includes HOPE VI redevelopment proposals, conversions slated for demolition but not disposition, certain proposals for conversion of public housing units to homeownership units, and for dispositions related to mixed-finance developments.<sup>7</sup> The first three of these exemptions are consistent with independent statutory provisions governing HOPE VI developments, conversions, and public housing resident homeownership programs.<sup>8</sup> The exclusion of units slated for homeownership was also brought forward from the previous demolition disposition rules as was the exemption for mixed-finance developments.<sup>9</sup>

### Severely Distressed Units

The final rule is also not applicable to demolitions (not dispositions) of severely distressed units carried out in accordance with the mandatory or voluntary conversion program.<sup>10</sup>

### Mixed-Finance Developments

Prior to QHWRA, the development of mixed-finance developments was authorized by regulations.<sup>11</sup> At the time, the demolition or disposition regulations exempted mixed-finance developments from the Section 18 disposition requirements when the sale occurred prior to the determination of the actual mixed-project development costs. In addition, Section 18 did not apply to (1) the reversion of a mixed-finance project to a PHA; (2) instances where an owner sought to dispose of mixed-finance public housing units to entities other than PHAs; (3) demolition of mixed-finance units; or (4) instances where owners sought to operate the mixed-finance units in a way that was inconsistent with public housing occupancy requirements after the development costs had been determined.

In QHWRA, Congress included new authorization for mixed-finance developments. It contained no language exempting mixed-finance developments from the requirements of Section 18.<sup>12</sup> Nonetheless, when HUD

<sup>1</sup>71 Fed. Reg. 62,354 (Oct. 24, 2006) (effective November 24, 2006).

<sup>2</sup>42 U.S.C. § 1437p (West 2003).

<sup>3</sup>Pub. L. 105-276 (Oct. 21, 1998).

<sup>4</sup>*Id.* Another part of Section 18 was removed pursuant to QHWRA. That section prevented a PHA from taking any steps to demolish public housing without HUD approval. Despite the statutory change the language is retained in the regulations, so that HUD may track units for funding purposes. The introductory comments state that no private right of action is established by this language. 71 Fed. Reg. 62,354 (Oct. 24, 2006).

<sup>5</sup>69 Fed. Reg. 75,188 (Dec. 15, 2004).

<sup>6</sup>The Housing Justice Network comments on the Proposed Rule on the Demolition or Disposition of Public Housing Projects, Feb. 14, 2005, are available at <http://www.nhlp.org/html/pubhsg/Comments%20to%20FR%204598%20on%20LH.PDF>.

<sup>7</sup>71 Fed. Reg. 62,354 (Oct. 24, 2006) (to be codified at 24 C.F.R. § 970.3(b)(11) and (12)). Hereinafter all citations will to the 2007 Code of Federal Regulation cites.

<sup>8</sup>42 U.S.C. § 1437v(g) (West 2003) (HOPE VI demolition pursuant to revitalization is not subject to § 1437p); *Id.* § 1437z—5(h)(2) (Required conversion of distressed public housing is not subject to § 1437p); 24 C.F.R. § 972.230(a)(2006). For the homeownership programs, *see e.g.*, 42 U.S.C. § 1437z—4(l) (West 2003) (resident homeownership program is not subject to §1437p).

<sup>9</sup>50 Fed. Reg. 50,894 (Dec. 13, 1985) *amended* by 60 Fed. Reg. 3,716 (Jan. 18, 1995) and 61 Fed. Reg. 19,719 (May 2, 1996), § 970.2.

<sup>10</sup>*See* 42 U.S.C. §§ 1437v(g) and 1437z—5(h)(2) (West 2003)

<sup>11</sup>24 C.F.R. Part 941, Subpart F (2006).

<sup>12</sup>The statute does permit a PHA to elect to exempt a mixed-finance project from payments in lieu of taxes (PILOT) and the provisions regarding need and cooperation agreements. 42 U.S.C. § 1437z—7(f) (West 2003).

proposed the new demolition disposition regulations, it exempted certain mixed-finance developments from the rules. Some commentators to the proposed rules argued that demolition or disposition related to mixed finance should be expanded. They complained that the process of obtaining approval of a mixed-finance plan was “already heavily regulated and time-consuming.”<sup>13</sup> In the final regulations, HUD agreed with those commentators. It stated that “section 18 of the 1937 Act and this regulation do not apply to public housing property to be used for mixed-finance developments.”<sup>14</sup> Accordingly, the final regulation makes two separate exceptions for dispositions related to mixed-finance developments.<sup>15</sup>

Unfortunately, the new final rule may also be interpreted as ambiguous with respect to the extent of the mixed-income disposition exemption. The rule states that certain dispositions for mixed finance are exempt, but the introductory language is not very precise. For example, it is not clear whether the rule also exempts in certain situations a demolition pursuant to a mixed-finance proposal. Many mixed-finance developments anticipate demolition and while the new owner might want a clear and developable site, the demolition may be undertaken by the new owner and may occur after the disposition to the new owner. In that case, does the demolition or disposition rule apply? If the disposition for mixed finance reduces the number of public housing units subject to an Annual Contribution Contract (ACC), does Section 18 apply in this context?<sup>16</sup> The answers to these questions are important because they determine whether the resident and public consultation requirements of Section 18 are applicable to the dispositions. It is also important because HUD cannot approve an application for demolition or disposition if it has information and data that is clearly inconsistent with the certification made by the housing agency.<sup>17</sup>

Plans to develop mixed-finance public housing should be part of the PHA Annual Plan process.<sup>18</sup> The plans for these types of developments, as referenced in the PHA

Annual Plan, are minimal.<sup>19</sup> To the extent that the mixed-finance development would require the use of capital funds, the information may be hidden in the attachments to the PHA's Annual Plan that address the use of capital funds.<sup>20</sup>

These issues regarding mixed-finance developments are increasingly important now that PHAs are subject to the asset management rules and Congress has chosen not to provide them adequate operating subsidy funding.<sup>21</sup> Due to the funding shortages, it is likely that PHAs will seek to convert developments to mixed-finance projects in order to deal with the funding shortfalls.

### ***De Minimis* Demolitions**

The new rules also do not apply to *de minimis* demolitions, defined as demolitions carried out over a five-year period of the lesser of five units or 5% of the PHA's stock. To qualify for the *de minimis* exclusion the remaining space must be used for resident needs or be beyond repair.<sup>22</sup>

### **The Application for Demolition or Disposition**

Proposals for the demolition or disposition of public housing must be approved by HUD unless they fall within one of the regulatory exemptions. Developments that are to be demolished must meet the statutory obsolescence criteria and there cannot be a reasonable program or modification that is cost effective that will allow the return of the project to a useful life. When only a portion of a development is to be demolished, the PHA's demolition application must show that the remaining portion of the development can be operated viably.

The indicia for determining obsolescence are set forth in the regulations and are not significantly different from those included in the prior regulations.<sup>23</sup> As for determining whether the development can be brought back to a useful life, the new rule establishes a standard that states that HUD generally will not consider modifications to a development to be cost effective if their cost exceeds 62.5% of total development costs (TDC) for elevator structures or 57.14% of the TDC for other structures.<sup>24</sup> When dispositions are proposed, the PHA must certify that retention of the development is not in the best interest of the residents or the PHA. Examples, which track the former rule, are included in the final rule.<sup>25</sup>

<sup>13</sup>71 Fed. Reg. 62,354, 62,355 (Oct. 24, 2006).

<sup>14</sup>*Id.*

<sup>15</sup>24 C.F.R. § 970.3(11) and (12) (2007).

<sup>16</sup>The mixed-finance developments that have been approved by HUD require that a PHA must develop at least the same number of public housing units as were approved by HUD as part of the PHA's proposal. The public housing units must be maintained as public housing for at least forty years, which may be extended for another ten years after the period in which the PHA received operating subsidies. 24 C.F.R. § 941.610(a)(8) (2006).

<sup>17</sup>42 U.S.C. § 1437p(b) (West 2003). Section 18 also provides for relocation benefits, but the Uniform Relocation Act (URA) is applicable to mixed-finance developments. 24 C.F.R. §§ 941.207, 941.602 (2006) (the regulation for mixed-finance developments currently provides that displacement should be minimized and URA benefits provided).

<sup>18</sup>HUD Policy Alert, Annual Plan (Jan. 2, 2002) available at [http://www.hud.gov/utilities/intercept.cfm?/offices/pih/programs/ph/hope6/mfph/policy\\_alerts/annual\\_plan-2002.pdf](http://www.hud.gov/utilities/intercept.cfm?/offices/pih/programs/ph/hope6/mfph/policy_alerts/annual_plan-2002.pdf).

<sup>19</sup>HUD form 50075, PHA Plans PHA Plans (expires 08/31/2009)), Section 7.B., Template available at <http://www.hud.gov/offices/pih/pha/templates/>.

<sup>20</sup>*Id.* Required Attachments.

<sup>21</sup>See *San Francisco Advocates Respond to Operating Subsidy Crisis*, 36 Hous. L. Bull. 197 (Oct. 2006).

<sup>22</sup>24 C.F.R. § 970.27 (2007). The prior regulations exempted the demolition or disposition of such units from the one-for-one replacement requirement. See 24 C.R.F. § 970.11(j) (2005).

<sup>23</sup>24 C.F.R. § 970.15 (2007).

<sup>24</sup>*Id.* § 970.15(b)(10).

<sup>25</sup>*Id.* § 970.17.

The new regulations require PHAs to certify that their demolition or disposition proposal has been described in the PHA annual plan and timetable in accordance with 24 C.F.R. Part 903 and that the Annual Plan description is “identical to the application submitted.”<sup>26</sup> Several commentators to the proposed regulations objected to this provision. In the final regulations, HUD responded by citing the purposes of the annual plan,<sup>27</sup> and stating that it did not believe that the process was duplicative or burdensome and noted that “a PHA may amend the [Annual] plan and submit significant changes to HUD.”<sup>28</sup>

High performing and small PHAs, which are authorized to submit streamlined Annual Plans, are exempt from making the same certification regarding the identical nature of the Annual Plan and the application for demolition or disposition. The HJN comments objected to this exemption.<sup>29</sup> HUD responded that

PHAs that are small or high performers are not entirely exempt from certifying their demolition plans. Those PHAs that are eligible to submit a streamlined plan are required to submit a certification listing the policies the PHA has revised since submission of its last Annual Plan, including those involving demolition and disposition. HUD believes that this certification is appropriate for PHAs using the streamlined process.<sup>30</sup>

Thus, with respect to the disposition or demolition plans for small or high performing PHAs, it appears that HUD will rely on the more general certification that accompanies their Annual Plan. Residents, advocates and the public who wish to review the certifications will have to compare the certification submitted with the Annual Plan with the application for demolition or disposition. It is not clear from the regulations whether the certification and the application must be identical.

Interestingly, the new regulations acknowledge that a PHA may seek HUD approval to rescind a demolition or disposition that has received prior approval.<sup>31</sup>

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<sup>26</sup>*Id.* § 970.7(a)(1).

<sup>27</sup>“The Annual Plan’s purpose is to provide a framework for local accountability and an easily identifiable source by which public housing residents, participants, and other members of the public may locate basic PHA policies, rules, and requirements; the PHA’s mission for serving the needs of low-income families; and the PHA’s goals and objectives to enable the PHA to reach that mission.” 71 Fed. Reg. at 62,357 (Oct. 24, 2006).

<sup>28</sup>*Id.*

<sup>29</sup>The HJN comments state that Section 18 of the U.S. Housing Act, 42 U.S.C. § 1437p(a)(3), requires such certifications by PHAs seeking to demolish or dispose of public housing without exception. Section 5A of the U.S. Housing Act, 42 U.S.C. §§ 1437c-1(d)(8) and 1437c-1(i)(2), expressly requires HUD to review descriptions of demolition and disposition activities and timetables in annual plans.

<sup>30</sup>71 Fed. Reg. 62,354, 62,357 (Oct. 24, 2006).

<sup>31</sup>24 C.F.R. § 970.7(b) (2007).

## Review and Approval Process

HUD will disapprove any application for demolition or disposition if the application is “clearly inconsistent with” the PHA Plan or any information that HUD has related to the justification for the demolition or disposition.<sup>32</sup> In addition, applications will be denied if they are not developed in consultation with residents, the Resident Advisory Board, or appropriate government officials.<sup>33</sup> PHAs must submit evidence of resident consultation and copies of any written comments with any evaluation that the PHA has made of the comments.<sup>34</sup>

In its comments to the proposed regulations, HJN requested that HUD establish more specific standards for the required resident consultation in order to ensure meaningful and consistent compliance with the relevant provisions of Section 18.<sup>35</sup> HUD did not adopt the HJN suggestion and simply responded that “PHAs should have flexibility in this area.”<sup>36</sup>

The demolition or disposition of a public housing development, including *de minimis* demolitions, is subject to HUD environmental regulations. As proposed, “unknown” future reuses would have been exempt from this requirement. HJN urged HUD to provide examples of whether future uses are known or unknown by including the description that was in the introductory comments to the proposed regulations in the final rule. HUD adopted this suggestion.<sup>37</sup>

## Relocation of Residents

The URA does not apply to demolition or disposition of public housing, but the statute does provide for certain notices and relocation requirements. The final rule states that, if applicable, residents must be relocated on a non-discriminatory basis in comparable housing in an area that is generally not less desirable.<sup>38</sup> The proposed rule referenced the relocation obligations that applied if CDBG funds were used for demolition or disposition.<sup>39</sup> In its comments, HJN stated that this language was too narrow and urged HUD to expand the reference to include HOME funds and to reference the one-for-one replacement obligation that accompanies the use of these funds. HUD adopted the HJN suggestion in the final rule.<sup>40</sup>

The final rule also provides that the relocation plan must include reasonable accommodations for persons

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<sup>32</sup>*Id.* § 970.29.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* § 970.9(a).

<sup>35</sup>42 U.S.C. § 1437p(b)(2)(A) (West 2003).

<sup>36</sup>71 Fed. Reg. at 62,360.

<sup>37</sup>*Compare* 69 Fed. Reg. 75,188, 75,191 (Dec. 15, 2004) with 24 C.F.R. § 970.13(b) (2007).

<sup>38</sup>24 C.F.R. § 970.21(a)(2007).

<sup>39</sup>69 Fed. Reg. 75,191 (Dec. 15, 2004) (§ 970.21(c)(2)).

<sup>40</sup>24 C.F.R. § 970.21(c)(2) (2007).

who need them.<sup>41</sup> The rule defines comparable housing and limits its availability to persons with a disability who are displaced from a unit with accommodations and need similar accommodations in the replacement unit.<sup>42</sup> The language regarding comparable housing may be confusing and misinterpreted as a limitation on reasonable accommodation requests by individuals with disabilities who need special features in their relocation unit but who are not currently living in a unit with such features.

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## Replacement Housing

The proposed rule provided that any replacement public housing built on the original site or in the neighborhood must have significantly fewer units than the number that are to be demolished.<sup>43</sup> HJN commented that the proposed rule omitted certain statutory language that gave the impression that replacement units may be built on site only if the number of such units is significantly fewer than the number of demolished units. The HJN comments argued that it would be entirely consistent with the statute for a PHA to rebuild an equal or greater number of units on-site if such development is consistent with applicable law, including site and neighborhood selection criteria.<sup>44</sup> The HJN comments urged that PHAs should have the option to do so. HUD adopted the HJN suggestion. HUD did not, however, explain the change in the regulation other than to admit that the regulation now mirrors the statute.<sup>45</sup>

## Reports

The final rules require PHAs to provide HUD with information about completion of demolition contracts, execution of sales or lease contracts, use of proceeds of sales and amounts expended for closing costs. HJN urged an expansion of the reporting requirement to include information about resident relocation outcomes. HUD

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<sup>41</sup>*Id.* §§ 970.7(a)(6) and 970.21(e)(2).

<sup>42</sup>*Id.* §§ 970.21(a) and (e)(1)(iii).

<sup>43</sup>69 Fed. Reg. 75,191 (Dec. 15, 2004) (§ 970.31).

<sup>44</sup>The language of the statute, 42 U.S.C. § 1437p(d), created a limited exception to site and neighborhood selection rules for the development of public housing. 24 C.F.R. § 941.202 (2006). The draft version of § 1437p(d) was specifically described as a "Site and Neighborhood Standards Exemption." 144 Cong. Rec. H 5743, H5792 (July 17, 1998) (statement of Rep. Lazio).

<sup>45</sup>71 Fed. Reg. 62,354, 62,361 (Oct. 24, 2006).

declined to adopt this suggestion and noted that with respect to relocation the rule appropriately implements the limited relocation provisions of the statute.<sup>46</sup>

## Residents' Right to Purchase a Development Slated for Disposition

The final rule also provides that under certain circumstances a PHA seeking to dispose of a development must offer it to an eligible resident organization or non-profit acting on behalf of the residents. An eligible resident organization is defined by reference to 24 C.F.R. Part 964.<sup>47</sup> By limiting the resident organization definition to existing organizations and ones that meet the requirements of Part 964, which requires the organization to be recognized by a PHA, some resident organizations will be unnecessarily disqualified. Also, because of the extremely short resident response times (thirty days to express an interest and sixty days to submit an offer), it is unlikely that many resident organizations or non-profits will be able to submit viable offers to take over a development.

## Conclusion

QHWRA eliminated substantial resident protections in the public housing demolition and disposition process. The final demolition and disposition rule, while better than the proposed rule, unfortunately implements changes mandated by QHWRA. Because the final rule contains ambiguities, it is expected that issues and questions will arise with respect to their implementation. ■

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<sup>46</sup>*Id.* at 62,358 (referencing the use of vouchers and a proposal to track families for at least three years). *See also* 42 U.S.C. § 1437p(a)(4)(A)(iii) (West 2003) which references a relocation obligation to offer comparable housing.

<sup>47</sup>24 C.F.R. § 970.9(c)(2007).

**The National Housing Law Project  
wishes a very happy, healthy, and  
peaceful New Year to all of the readers  
of the *Housing Law Bulletin*.  
May we advance housing justice for all  
those who we represent and work for.**