

HUD Guidance Clarifies Tenant Protections in the Rental Assistance Demonstration*

The Department of Housing and Urban Development (HUD) has taken a number of steps to implement the Rental Assistance Demonstration (RAD) program, including publishing a final notice on the program, posting a variety of materials on its website, and holding weekly webinars on the program.¹ This article reviews several of these recent developments in the context of public and resident participation and tenant protections.

Background

RAD has two components. The first component allows public housing and Moderate Rehabilitation (Mod Rehab) properties to convert up to 60,000 units to long-term Section 8 rental assistance contracts, either project-based rental assistance (PBRA) or project-based vouchers (PBV).² The second component allows Rent Supplement, Rental Assistance Payment, and Mod Rehab properties (also known as the legacy programs) to convert tenant-based vouchers issued upon contract expiration or termination to PBV.

All of these conversions are voluntary. The first component had a competitive phase that required the submission of applications by October 24, 2012. Because the applications in the competitive phase did not reach the 60,000 statutory maximum, applications are now accepted and considered on a rolling basis. The ongoing application period began October 25, 2012. Applications received in the ongoing period are reviewed in the order received. As of December 20, 2012, HUD had awarded 112 applications a Commitment to enter into a Housing Assistance Payment (CHAP) contract.³ PHAs in 25 states were awarded a CHAP.

The first RAD component was designed in response to the \$27 billion backlog of unmet capital needs in public housing. The annual average accrual of public housing capital needs is over \$3 billion, and appropriations for the capital fund have been decreasing. As a result, 10,000 to 15,000 public housing units are lost annually. In addition, due to sequestration and any budget compromise, it is possible that the public housing operating fund and the

*This article was written with the assistance of Imron Bhatti, a J.D. candidate at the University of California, Davis School of Law (King Hall) and an intern with the National Housing Law Project.

¹For additional RAD materials, see HUD's website at <http://portal.hud.gov/hudportal/HUD?src=/RAD>.

²NHLP, *Congress Enacts Rental Assistance Demonstration Project*, 41 Hous. L. BULL. 269, 269 (Jan. 2011).

³HUD, *Application and Conversion Request Award Summary*, <http://portal.hud.gov/hudportal/HUD?src=/RAD/appsummary>.

capital fund will be cut, which will further affect PHAs' ability to preserve public housing.

Under RAD, PHAs are permitted to leverage sufficient resources to recapitalize a development with a rent subsidy contract.⁴ However, not all PHAs are in markets that will permit conversion, because Congress limited the value of the subsidy contract to the amount of operating subsidy and the capital fund for the converting development.⁵ In many markets, this amount will not leverage sufficient capital to stabilize and improve the property for the long term.

In its final RAD notice and Frequently Asked Questions,⁶ the Department of Housing and Urban Development (HUD) responded favorably to several concerns flagged by housing advocates and residents⁷ in response to the initial notice published in March 2012.⁸ Unfortunately, HUD rejected some key concerns and added new ones. Thus, there is a need for follow-up work and advocacy with HUD and at the local level.

The article will address the selected improvements to RAD and highlight ongoing areas of concern regarding resident engagement, resident grievance and eviction procedures, resident organizations, and the rights of tenants at the time of conversion. The article will discuss the initial HUD notice that laid out the RAD program, comments submitted by residents and advocates and HUD's response. Future issues of the *Bulletin* will address other critical issues, such as one-for-one replacement, mobility, transfers of ownership, long-term affordability, foreclosure and loan default, financing and rehabilitation plans.

HUD has set forth the following schedule once a RAD application is accepted:

- HUD issues a Commitment to enter into a Housing Assistance Payment (CHAP)
- Within 30 days, PHA submits an accepted lender engagement of commitment letter
- Within 60 days, PHA submits a significant amendment to its Annual/Five Year Plan
- Within 90 days, PHA submits certificate that due diligence has been performed by lender

⁴H.R. REP. NO. 112-284, at 123 (2011) (Conf. Rep.) [hereinafter RAD Legislation].

⁵*Id.*

⁶Available at <http://portal.hud.gov/hudportal/HUD?src=/RAD> and <http://radresource.net/data/radfaq.pdf>.

⁷Letter from Housing Justice Network to HUD Regarding Docket No. FR-5630-N-01, "Rental Assistance Demonstration—Partial Implementation and Request for Comments," 77 Fed. Reg. 14,029, revised by 77 Fed. Reg. 20,407 (Apr. 23, 2012) [hereinafter Advocate Comment Letter]; Letter from Resident Engagement Group to HUD regarding Docket No. FR-5630-N-01, "Rental Assistance Demonstration—Partial Implementation and Request for Comments," 77 Fed. Reg. 14,029, revised by 77 Fed. Reg. 20,407 (Apr. 23, 2012) [hereinafter Tenant Comment Letter].

⁸Response to Public Comments Received on PIH Notice 2012-18, PIH 2012-32, at 17 (July 26, 2012) [hereinafter Response].

- Within 150 days, PHA submits certificate that it has applied for all firm commitments of all financing
- Within 180 days, PHA submits financing plan
- Within 320 days, PHA submits firm commitment of financing
- Within 360 days, financing closes
- Within 12 to 18 months of closing, rehabilitation is completed

Notice and Comment Requirements

Congress required HUD to seek public comment on the RAD rules and to provide for comment by residents of properties selected for RAD conversion.⁹ HUD's initial RAD notice required that a PHA, *before* submitting a RAD application, notify residents of projects proposed for conversion, conduct at least two meetings, provide an opportunity to comment, and respond to those comments.¹⁰ Once the RAD application meets preliminary approval, the PHA must hold at least one more resident meeting.¹¹

The initial notice also recognized that if the property were selected for RAD conversion, the proposal to convert would be regarded as a substantial amendment of the PHA's Annual Plan,¹² which would necessitate public notice and consultation with the Resident Advisory Board (RAB). However, HUD initially did not require the substantial amendment until the PHA submitted the Financing Plan.

Advocate and Tenant Response

Advocates and tenants submitted comments to HUD requesting that the public participation requirements be strengthened in a variety of ways, as discussed below.

PHA Plan Process: Advocates and residents supported HUD's proposal that conversion of a development requires a substantial amendment to the PHA Plan.¹³ However, they argued that the timing of this engagement was too late for residents' concerns to shape the outcome of the RAD application and urged that the process occur prior to the submission to HUD of the initial application.¹⁴

In addition, advocates noted that although HUD recognized that conversion to PBV allows the development to remain subject to the PHA Plan process, this is not the case with conversions to PBRA. Advocates and tenants argued that remaining subject to the PHA Plan process

⁹RAD Legislation, *supra* note 4, at 123.

¹⁰Rental Assistance Demonstration—Partial Implementation and Request for Comments, PIH 2012-18 (Mar. 8, 2012) 34 [hereinafter Initial Notice].

¹¹*Id.*

¹²*Id.* at 22.

¹³Tenant Comment Letter, *supra* note 7, at 2 and Advocate Comment Letter, *supra* note 7, at 2.

¹⁴*Id.*

after conversion benefits residents and management by providing a forum to address problems and solutions. Accordingly, they requested that HUD require ongoing public and resident engagement prior to each of the conversion milestones and benchmarks,¹⁵ and that PBRA conversions remain subject to the PHA Plan process.

Resident Involvement at Development Level: Advocates and residents also argued that residents of the converting developments should be involved as plans change. They also argued that if there is significant resident dissatisfaction with a RAD proposal, it should be the basis for a HUD rejection or modification of the proposal.¹⁶ Significantly, advocates and tenants additionally urged that funds and technical assistance should be made available to residents to assist them in understanding and commenting on RAD proposals.¹⁷

Limited English Proficiency: Finally, advocates urged that HUD provide guidance regarding the applicability of limited English proficiency (LEP) rules to maximize communication with LEP residents.

HUD Response

HUD acknowledged the comments submitted by advocates and tenants and made some changes, but the agency fell short in crafting a solution that would maximize resident input.

PHA Plan Process: HUD's final RAD notice adds a requirement that the PHA Plan amendment be completed within 60 days of HUD issuing the CHAP contract. This is 120 days earlier than originally proposed, but still substantially after the process is well on its way.¹⁸ Moreover, to the extent that there was insufficient time to require PHA Plan compliance for the initial competitive phase, which was 90 days, there are no time constraints for the ongoing/rolling application process. Therefore there is no rationale for allowing the PHA Plan process to occur so late in the RAD application process. On the plus side, the final notice expanded the list of minimum information that must be in the PHA Plan, including a description of the units to be converted, any change in the number of units and bedroom distribution, changes in policies regarding admission and occupancy and if there will be a transfer of rental assistance to units offsite.¹⁹

¹⁵The conversion benchmarks include elements that must be included in the financing plan, such as a physical condition assessment, scope of work for rehabilitation or new construction, environmental review, relocation plan, development budget and identification of development team. Rental Assistance Demonstration – Final Implementation, PIH 2012-32, at 65-69 (July 26, 2012) [hereinafter Final Notice].

¹⁶*Id.*

¹⁷Tenant Comment Letter, *supra* note 7, at 3 and Advocate Comment Letter, *supra* note 7, at 2.

¹⁸The financing plan is due 180 days following issuance of a Commitment to enter into a Housing Assistance Payment. Final Notice, *supra* note 15, at 60. The Initial Notice proposed that the PHA Plan amendment be submitted with the Financial Plan.

¹⁹Final Notice, *supra* note 15, at 26. Any change in the distribution of units by bedroom size must be approved by the PHA Board as part of

Resident Involvement at Development Level: The final notice also requires an additional resident meeting if there are significant changes to the RAD conversion or Financing Plans.²⁰ These significant changes include, but are not limited to, a transfer of assistance to another site or of ownership, change in the number of assisted units, or substantial changes in scope of work.²¹ An additional meeting is an important improvement. However, HUD should have also required an amendment to the PHA Plan for these and other significant changes to the RAD conversion or financing plans.

Limited English Proficiency and Access to Documents: The Final Notice adds requirements that PHAs and owners make documents available to residents of properties proposed for conversion either online or via hard copies, and it includes additional language requiring compliance with 24 C.F.R. § 8.6 on accessible communications and Executive Order 13166 on limited English proficiency with respect to certain activities.²²

Technical Assistance for Residents: HUD has stated that it is exploring the potential use of existing funding sources to provide residents with technical assistance to help them understand the meaning of conversion. In addition, for properties actively seeking or undergoing RAD conversions, HUD stated that it intends to provide more detailed information.²³ In September, HUD conducted a webinar geared to residents to explain the RAD process, which is now posted on the HUD website. Unfortunately, it is not clear that residents in developments slated for RAD conversions attended the webinar. It is also not clear that HUD notified and urged PHAs to facilitate resident participation in this webinar by notifying tenant commissioners or RAB members of the webinar.

Finally, HUD rejected the suggestion that strong resident dissatisfaction should be a basis for denial of a RAD proposal. HUD said it included the provision for the legacy programs because those tenants would be giving up access to a tenant-based voucher so as to provide for a PBV contract. HUD also implied that there was not a similar need because public housing residents would have an additional opportunity to object in the PHA Plan process.²⁴

Issues Related to PBRA Conversions: HUD declined to make PBRA conversions subject to the PHA Plan process.²⁵ Additionally, HUD did not adopt advocates' posi-

the approval of the application and noted as a significant amendment to the Annual Plan. Response, *supra* note 8, at 11.

²⁰Final Notice, *supra* note 15, at 47; Response, *supra* note 8, at 16.

²¹*Id.*

²²Response, *supra* note 8, at 17; Final Notice, *supra* note 15, at 47 (meetings and materials regarding resident notification); *id.* at 19 and 67 (references the need for LAPs in the context of temporary relocation and the URA); *id.* at 35-36 and 43-44 (communications regarding the PBV and PBRA waiting lists).

²³Response, *supra* note 8, at 21-22.

²⁴*Id.*

²⁵*Id.* at 17.

tion that tenants in units converted to PBRA serve as resident representatives on the RAB or as a tenant commissioner.²⁶ Nevertheless, HUD did state that the PHA could voluntarily include a resident of a property converted to PBRA on the RAB or the board.²⁷ This indicates that the PBRA tenant could serve on the board in addition to a public housing or voucher representative and could be a member of the RAB at the discretion of the PHA.

Advocacy at the Local Level

In light of the final RAD notice, advocates and residents could seek the following at the local level:

- More detailed information to be included in the Annual/5 Year plan, such as the timing of any proposed rehabilitation and/or demolition, whether relocation is planned, to whom the property will be transferred and whether Low-Income Housing Tax Credits (LIHTCs) will be considered.²⁸
- As part of the first PHA Plan review and the meetings with the residents at the converting development, identify the key elements of the RAD plan, which if changed require additional engagement with the residents at the development and an amendment to the PHA Plan.
- More frequent meetings with the RAB regarding the conversion plans and any changes to those plans.
- More frequent meetings with residents of developments that are targeted for conversion.
- A local policy that representatives from properties converted to PBRA may serve on the RAB so as to increase and share tenant knowledge of the consequences of conversion.
- Consideration of whether residents in units converted to PBRA should be represented on the PHA board.
- A local policy that if a majority of the residents at a development do not want the property converted to RAD, the PHA will not submit a RAD application.
- More detail on how the PHA will comply with federal policies designed to protect limited English proficient (LEP) individuals, such as Executive Order 13166, throughout the conversion process.
- A Language Assistance Plan (LAP) that details how the PHA serves LEP populations, what interpretation and translation services are provided by the PHA, and which language populations are served.

²⁶*Id.*

²⁷*Id.*

²⁸For an idea of what issues will ultimately be considered by the PHA, see the list of benchmarks to be included in the financial plan. See Final Notice, *supra* note 15, at 65-70.

- A LAP that is routinely followed by all PHA employees.
- As part of a LAP, all “vital documents” containing information that affect a resident’s housing rights will be translated into the widely spoken, non-English languages within the PHA’s jurisdiction, including documents related to a development’s conversion.
- Language interpretation services at any meetings with tenants concerning the conversion process and translation of written materials provided at these meetings.

Advocacy with HUD

At the HUD level, advocates and tenants could take the following steps regarding the RAD conversion process:

- Determine if HUD has identified funds to provide technical assistance to residents in developments slated for conversion.
- Determine what additional information HUD will provide to residents of properties that are undergoing RAD conversions. Urge HUD to reach out through PHAs and others to tenants in developments slated for conversion and provide trainings and other technical assistance for these residents.
- Ask HUD to identify and translate vital documents, such as: (1) the leases to be used at the PBRA and PBV developments; (2) a list of the rights of residents in converted properties;²⁹ (3) the use agreement; and (4) housing assistance payments contracts.
- Ask HUD to post translated documents on its HUD website and inform PHAs that such documents are available.

Lease, Grievance and Eviction Rights

RAD legislation provided that residents of converted properties maintain at a minimum the rights that residents have under Section 6 of the United States Housing Act.³⁰ Section 6 includes a number of tenant protections, including the grievance procedures, good cause for eviction and eviction notice requirements.³¹ Longstanding public housing grievance rights include the right to dispute adverse action (including inaction) of the PHA through a two-step informal and formal dispute resolu-

²⁹HUD created a summary of the resident provisions. See Final Notice, *supra* note 15, at 73.

³⁰RAD Legislation, *supra* note 4, at 123.

³¹42 U.S.C.A. § 1437d (West 2012). The Violence Against Women Act (VAWA) protections are also included in Section 6, but VAWA applies to PBV and project-based Section 8. Thus, the VAWA protections should continue to apply to residents in converted properties.

tion process.³² The initial RAD notice gave only cursory treatment to the grievance process and contained no reference to eviction notices.³³

Advocate and Tenant Response

Advocates and residents argued that HUD should specify the grievance rights retained by residents, emphasizing the two-step nature of the grievance resolution process and the importance of disputing inaction as well as action by the PHA or owner. They also raised the eviction notice issues.

HUD Response

HUD responded to the notice issue for both conversions to PBV and PBRA by providing that tenants must be given a 14-day notice for any eviction for nonpayment of rent and a notice not to exceed 30 days or a reasonable period, except where state or local law permits a shorter period.³⁴ The final RAD notice does not state that these notice periods, especially the 14-day notice for nonpayment of rent, will be incorporated into PBV and PBRA leases. But HUD appears to be taking some steps in the right direction, as the rider to the PBV housing assistance payments (HAP) contract includes a reference to the 14-day notice.³⁵ There is nothing similar for PBRA.

With respect to the grievance procedure, HUD recognizes the obligation to provide residents of converted public housing projects the same procedural rights as contained in Section 6.³⁶ However, full implementation of that obligation is lacking. In the final notice, HUD expanded the grievance language, used slightly different language for PBV and PBRA, and added confusion. For units converted to PBV, HUD requires a hearing for issues related to tenancy and termination and for any dispute that a resident may have with respect to PHA action regarding the lease.³⁷ The hearing process to be used for PBV units is 24 C.F.R. § 982.555, which is the voucher hearing process. The final notice states that the hearing process is applicable to any eviction action. Critically, it is not clear whether the tenant may request a grievance hearing for actions by the owner and whether the owner is bound

by any hearing decision and is prohibited from filing an eviction action prior to a final grievance decision. Additionally, there is no mention of including the right to a grievance hearing in the tenant lease. However, the rider to the PBV HAP contract states that the owner and the contract administrator must comply with the grievance process requirements.³⁸

The grievance process for tenants in units converted to PBRA is also incomplete and confusing.³⁹ The procedure includes notice of an owner's proposed adverse action and the right to a hearing. The hearing is before an impartial member of the PHA staff, at which the tenant has a right to representation, to examine any evidence relied upon by the owner, and a written decision. The Final Notice states that the PHA is bound by the decision, but fails to mention that the owner is also bound by the decision. If the PHA determines that it is not bound by the decision it must notify the tenant, but is not obligated to notify the owner. Again there is no mention of including the right to a grievance hearing in the tenant lease.

For both PBV and PBRA, the final notice uses the term "PHA (as owner)" without explaining the meaning of the term.

HUD's response ignored advocates' and tenants' requests that the grievance process for the converted units track the current public housing process more closely and failed to require the two-step process of an informal review followed by the more formal grievance hearing and did not require a hearing for agency and/or owner inaction.

Additional Advocacy

For developments that have been converted under RAD, advocates and residents could seek the following clarifications at the local and/or HUD level regarding leases, grievances and evictions:

- For PBV conversions, clarify that the hearing is applicable to adverse actions by the owner as well as the PHA.
- For PBV and PBRA, make clear that property owners are bound by the hearing decision.
- For PBRA, clarify that a tenant is entitled to a hearing and a decision prior to the filing of an eviction action.
- For PBV, clarify that the tenant is entitled to a decision from the hearing prior to the owner filing an eviction action.
- For PBV and PBRA, request that the right to a 14-day notice for an eviction for nonpayment of rent and a hearing is included in the tenant lease.

³²24 C.F.R. pt. 966, subpt. B (2012).

³³Initial Notice, *supra* note 10, at 26 and 41-32.

³⁴The Final Notice uses different language regarding the 30-day notice for the PBRA and PBV program. Compare Final Notice, *supra* note 15, at 33 and 42; see also Response, *supra* note 8, at 32-33 (the additional requirements regarding termination notification were "erroneously omitted" from the initial notice).

³⁵See Rental Assistance Demonstration (RAD), Rider to the Section 8 Project-based Voucher (PBV) Housing Assistance Payments (HAP) Contract for New Construction or Rehabilitated Housing (Public Housing Conversions; First Component) at 3, available at <http://portal.hud.gov/hudportal/HUD?src=/RAD/contracts> [hereinafter Rider for PBV HAP].

³⁶Response, *supra* note 8, at 32.

³⁷Final Notice, *supra* note 15, at 33. The PHA will serve as the contract administrator for any public housing that is converted to PBVs. See Response, *supra* note 8, at 6.

³⁸Rider for PBV HAP, *supra* note 35, at 5.

³⁹Final Notice, *supra* note 15, at 42-43.

- Request that HUD clarify the meaning of the term “PHA (as Owner).”
- Request that HUD clarify that the PBV require the renewal of all leases upon lease expiration, unless cause exists.⁴⁰
- Urge the PHA to agree in writing to require a two-step grievance process.
- Urge the PHA to agree in writing to consider grievances for agency and owner inaction, so that complaints such as failure to maintain the premises or to conduct an interim recertification of income and readjustment of rent may be heard.
- Urge the PHA to agree to incorporate other provisions of the public housing grievance procedure for those units converted to RAD, such as the process of selecting a hearing officer and the procedures governing the hearing.⁴¹
- Urge the PHA to agree to incorporate any provisions from the public housing grievance process that have been adopted locally.

Resident Participation

The RAD legislation provided that residents of converted units maintain at a minimum the rights that residents have under Sections 6 and 9 of the United States Housing Act.⁴² Section 9 contains the funding provisions for public housing operating and capital fund and authorization for appropriations for grants for technical assistance for resident councils/organizations.⁴³ The operating fund includes activities to provide for resident participation in PHA management and policy.⁴⁴ Pursuant to Sections 6 and 9 and other authorities, HUD issued tenant participation rules for public housing residents.⁴⁵

The initial notice stated that HUD strongly supports resident involvement in conversion and management of converted properties.⁴⁶ However, for the PBV program, the initial notice was cryptic and mentioned recognizing legitimate tenant organizations but did not adequately define such an organization.⁴⁷ For conversions to PBRA, the initial notice stated that the tenant participation rules at 24 C.F.R. Part 245 would apply. The initial notice stated for both PBV and PBRA conversions that at least \$25 per

unit per year must be provided for resident participation, of which at least \$15 must be available to legitimate resident organizations.⁴⁸

Advocate and Tenant Responses

Advocates argued that the initial notice did not sufficiently stress the importance of PHAs and owners engaging residents, on an ongoing basis, through resident organizations. For PBV conversions, the initial notice was not specific as to what constituted a legitimate resident organization. There was no mention in the initial notice of the public housing tenant participation rules. Advocates also raised the concern that the initial notice did not address the situation in which there was no active resident organization.⁴⁹

With respect to the \$25, advocates and tenants urged HUD to amend the initial notice to recognize HUD policy that resident organizations are entitled to receive the full \$25 per unit per year amount, as opposed to setting a minimum of \$15.⁵⁰

Advocates also raised the issue of the membership of a resident organization in a property with converted assistance in a jurisdiction-wide organization. They argued that including representatives of developments converted to PBV and PBRA in the jurisdiction-wide organization should not interfere with the jurisdiction-wide organization’s right to be recognized by the PHA.⁵¹

HUD Response

HUD responded to the request for more detail regarding tenant participation by repeating nearly verbatim the Part 245 regulations.⁵² Unfortunately, changes to those regulations have undercut the rights of tenants converted to PBV to organize. The final notice substitutes throughout the term “PHA” for the terms “owners and their agents.” The effect of such a change is that the obligations are all imposed upon the PHA and not the PBV owner or agents. The rider to the PBV HAP contract⁵³ acknowledges that the owner has some obligations but merely refers back to the final notice. Thus it appears it is the obligation of the PHA, not the owner, to recognize the resident council, allow tenants to engage in protected activities, allow for canvassing and provide space for meetings. These obligations should be imposed on the owner and agents of the development as well as the PHA. This is necessary because in many situations the owner of the converted property will no longer be the PHA. As such it is not clear how the PHA will have control over issues such as canvassing, or access to meeting rooms. Additionally the enforcement provisions of the Part 245 rules⁵⁴ were not included in the final notice.

⁴⁰See Final Notice, *supra* note 15, at 32. HUD has issued a Rider to the PBV HAP with this correction. See Rider for PBV HAP, *supra* note 35, at 4.

⁴¹*See, e.g.*, 24 C.F.R. §§ 966.55(b), 966.56 (2012).

⁴²RAD Legislation, *supra* note 4, at 123.

⁴³42 U.S.C.A. § 1437g (West 2012)

⁴⁴42 U.S.C.A. § 1437g(e)(1)(E), (h) (West 2012).

⁴⁵24 C.F.R. pt. 964, subpt. B (2012). The resident participation regulations were initially published in 1986.

⁴⁶Initial Notice, *supra* note 10, at 33.

⁴⁷*Id.* at 26-27.

⁴⁸*Id.* at 26-27, 31.

⁴⁹Advocate Comment Letter, *supra* note 7, at 5-6.

⁵⁰*Id.* and Tenant Comment Letter, *supra* note 7, at 4.

⁵¹*Id.*

⁵²Final Notice, *supra* note 15, at 7.

⁵³Rider for PBV HAP, *supra* note 35, at 5.

⁵⁴24 C.F.R. § 245.135 (2012).

The final notice provides for \$25 per unit per year, but unfortunately retained the reference to a \$15 minimum for the tenant organization.⁵⁵ It is not clear where these funds will come from. The final notice states that the PHA must provide the funds, as the funds currently are included in the operating fund that the public housing development receives, but it is unclear how this would be arranged in the conversion context.⁵⁶ RAD provides that a converted property may have available no more than the operating and capital funds attributed to the property. Thus, if the owner of the PBV or PBRA development is not the PHA, it is unclear how a PHA would withhold that amount from the owner to make available to residents. It is also unclear what will happen to resident participation funds if a resident organization does not request the funds. These issues must be resolved and included in the financial plan and the PHA Annual Plan.

HUD did include in the final notice instructions regarding what happens in the absence of a legitimate resident organization.⁵⁷ The final notice encourages the PHA and the residents to work together to foster a constructive relationship and the formation of a legitimate resident organization. Unfortunately, this obligation does not appear to impose any responsibilities on the owner. This omission should be corrected. For both PBV and PBRA, the PHA must make resident participation funds, subject to its approval, available for organizing activities at developments that do not have legitimate tenant organizations, upon the written request of the residents.⁵⁸ Again if this is to occur, it must be clear in the initial financial plan that these funds are reserved and available for the resident organization.

The final notice states that PHAs' recognition of jurisdiction-wide resident organization should not be affected by a RAD conversion. PHAs must still continue to recognize jurisdiction-wide organizations according to program rules.⁵⁹ But the notice did not address the question of whether a jurisdiction-wide resident council may include representatives from converted properties and continue to be recognized as a jurisdiction-wide resident council.

Advocacy at the Local Level

Advocates can take the following steps at the local level to maximize resident participation during and after a RAD conversion:

- Get the PHA to enter into a written agreement with the PBV owner of the converted property to comply with resident participation rules. The PBV owner should be obligated to recognize the resident council,

allow tenants to engage in protected activities, allow for canvassing and provide space for meetings.

- Advocate locally for the maximum level of funding (\$25 per unit per year) for resident participation.
- If there is a public housing jurisdiction-wide resident organization, and the resident organization at the converting property is or will be a member, determine and formalize what role the resident organization wants with respect to the jurisdiction-wide resident council after conversion.
- Make sure that residents, the PHA, and owner, if different, identify in writing where the \$25 per unit per year will come from over the length of the contract.
- Determine how the PHA intends to spend the tenant participation funds if there is no legitimate resident organization.

Advocacy with HUD

At the HUD level, advocates and tenants can take the following steps regarding resident participation:

- Ask HUD to address funding issues so that if a new resident organization forms, the organization can access tenant participation funds.
- Ask HUD to change the language in the final notice to impose the tenant participation obligations on PBV owners and their agents. Additionally, ask HUD to incorporate the enforcement provisions from the Part 245 regulations and ensure that the regulations apply to PBV conversions.

Rights of Residents Living in Units at the Time of Conversion

Congress was concerned about residents in converted units and sought to preserve basic rights, such as a right to the grievance procedure and a right to funding of resident organizations. In addition, it stated that the conversion of assistance "shall not be the basis for re-screening or termination of assistance and that the family shall not be considered a new admission."⁶⁰

The initial notice recognized the right not to be rescreened and added a provision regarding a three- to five-year phase-in of rent increases of more than \$25 per month resulting from the conversion. The HUD notice stated that such rent increases might occur, for example, if rent was less than 30% of a resident's income as a result of flat rent, ceiling rent or an MTW rent reform policy. The initial notice also added a right to return after temporary relocation.⁶¹ In addition, the initial notice stated that the

⁵⁵Final Notice, *supra* note 15, at 75-78.

⁵⁶*Id.*

⁵⁷Final Notice, *supra* note 15, at 75-76.

⁵⁸*Id.* at 75-78.

⁵⁹*Id.* at 18.

⁶⁰RAD Legislation, *supra* note 4, at 124.

⁶¹Initial Notice, *supra* note 10, at 26, 31 (rent phase-in), 61 (temporary relocation), 28 & 32 (Section 3).

PHA must honor any waiting list that currently exists for the property⁶² and that Section 3⁶³ applies to all initial repairs that are identified in the financing plan to the extent that such repairs qualify as construction or rehabilitation.

Advocate and Resident Response

Advocates supported the no rescreening policy but were concerned that the initial notice was not explicit on the issue of rescreening residents who were in court proceedings or in arrears in rent or other charges to the PHA at the time of the conversion. They urged that the final notice explicitly allow such residents to retain tenancy.⁶⁴ They also supported the rent phase-in proposal, but urged HUD to spell out additional scenarios that might lead to rent increases so as to make the consequences of conversion more understandable to tenants.⁶⁵ Advocates and tenants supported the Section 3 policy but urged Section 3 to apply to ongoing management and maintenance, as is the case with public housing.

HUD Response

Rescreening. HUD agreed with advocates and stated that “[u]nder RAD conversions, to the extent that a tenant is in a court proceeding, owes money to the PHA or is otherwise not lease-compliant, the tenant at the time of conversion of assistance cannot be rescreened.”⁶⁶ The HUD FAQ states that the no rescreening policy also applies to other prior criminal activity, including lifetime registered sex offenders.⁶⁷ The no rescreening policy does not prohibit any redetermination of income that is otherwise required, such as determining eligibility for Low-Income Housing Tax Credit (LIHTC) units. If such a tenant wishes to remain, he or she has the right to, but the unit would not be eligible for the LIHTC program.⁶⁸ This possibility of being over income should be fully explained to residents.

Rent Increase Phase-in. HUD acknowledged the additional scenarios in its response to public comments, which could cause a tenant’s rent to increase due to conversion, but made no mention of them in the final notice.⁶⁹

Section 3. HUD did not change the Section 3 policy.

⁶²*Id.* at 28, 32.

⁶³24 C.F.R. pt. 135 (2012).

⁶⁴Advocate Comment Letter, *supra* note 7, at 10-11.

⁶⁵*Id.* at 11.

⁶⁶Response, *supra* note 8, at 33.

⁶⁷Available at <http://radresource.net/data/radfaq.pdf>; see also *id.* at 29 (a PHA or other owner of a converting property cannot summarily evict a tenant because of the conversion; the new owner must accept the tenant regardless of the new owner’s admission criteria; the waiver of rescreening applies to issues that predate the RAD conversion).

⁶⁸*Id.* at 32.

⁶⁹Response, *supra* note 8, at 34. The additional scenarios include when the tenant may benefit from the earned income disregard, or if the tenant receives additional deductions allowed by PHA flexibility, different utility allowances, difference in the minimum rent and prorating for mixed households due to immigration or citizenship, or different policies regarding reporting of increased income.

Thus, it will apply to the rehabilitation and construction phase of the conversion process, but not ongoing management or maintenance.

Additional Advocacy

Advocates can take the following steps regarding rights of residents living in units at the time of a RAD conversion:

- Ask the PHA to require the new owner to apply Section 3 hiring goals and opportunities to ongoing management and maintenance.
- Make sure that any contractors understand and comply with the Section 3 goals.
- Ask the PHA to explain to the converting tenants all of the relevant scenarios that might result in a rent increase for a participating family or that might result in a family being over income.
- Review the PHA process for developing a waiting list for the converted properties which includes all of the applicants on the prior waiting list and any current public housing residents who may be interested in transferring to the converted property.

Conclusion

There are many new rules, instructions and documents for the RAD program, and the RAD legislation contains tenant protections. Nevertheless, there are improvements that could be made to ensure that the objectives of the RAD program are fulfilled and that reasonable tenant policies are developed and implemented. ■