

Congress Enacts Rental Assistance Demonstration Program

As part of the 2012 appropriations bill for the Department of Housing and Urban Development (HUD),¹ Congress enacted the Rental Assistance Demonstration (RAD) program. RAD is an outgrowth of efforts pursued over the prior two years to allow public housing agencies (PHAs) to convert some public housing developments to the project-based voucher (PBV) or project-based Section 8 program. The purpose of RAD is to preserve and improve public housing. RAD is designed to demonstrate the proposition that, if PHAs have the flexibility and a rent subsidy contract for a development, they can leverage sufficient resources to recapitalize the development. RAD also allows certain other housing units owned by PHAs or private entities to convert to PBVs.

The need for additional funds for aging public housing developments is widely acknowledged and documented. There is a capital needs backlog of \$25.6 billion, with an annual accrual rate of \$3.4 billion.² It is estimated that approximately 10,000 units of public housing nationwide are lost to disposition or demolition every year, and that number is expected to accelerate. Congress chose RAD to address the problem for part of the public housing stock. However, it simultaneously refused to provide adequate funding for the capital fund, approving only \$1.875 billion for fiscal year (FY) 2012. This is slightly more than half of the amount needed to stay current with the accrual of capital needs.³

The final version of RAD contains many, but not all, of the elements that many residents sought. It also closely tracks a version of RAD that HUD proposed in August 2011.⁴ Residents have responded to RAD in a variety of ways. Many sought to defeat the proposal. Others, supportive of the concept of RAD or concerned that it could be enacted despite efforts to defeat it, worked to improve the proposal. They advocated including resident consultation rights, protection of current residents and ongoing resident rights, long-term affordability, and public ownership. These principles are reflected in the final version of RAD.

¹H.R. REP. NO. 112-284, 157 CONG. REC. H7433, H7465 (2011) (Conf. Rep.).

²MERYL FINKEL ET AL., *ABT ASSOCS. INC., CAPITAL NEEDS IN PUBLIC HOUSING, FROM INSIGHT TO IMPACT, REVISED FINAL REPORT* (2010), http://portal.hud.gov/hudportal/documents/huddoc?id=PH_Capital_Needs.pdf.

³This appropriation represents a new low for the capital fund, which was funded at \$2.04 billion for FY 2011 and \$2.5 billion for FY 2010. Over the past two years, the capital fund has experienced an unprecedented 25% reduction from what was already an inadequate funding level given the inventory's annual accrual of capital needs.

⁴The most recent HUD version of RAD was supported by a number of national groups, including the Council of Large Public Housing Authorities, the National Low Income Housing Coalition and the Center on Budget Policy and Priorities.

RAD's key elements regarding public housing conversions include:

1. A PHA may voluntarily convert public housing units to a PBV contract or to a Section 8 project-based subsidy contract.
2. The program is limited in both time and size. Applications to convert may not exceed 60,000 units of public housing and/or Section 8 Moderate Rehabilitation units.⁵ The applications for conversion of public housing may be received by HUD for four years, until September 30, 2015.
3. Current residents of units converted from public housing are protected. RAD does not permit eviction, termination or rescreening due to the conversion. Current tenants are not to be considered new applicants for any purpose, including targeting.⁶
4. HUD shall issue for public comment draft eligibility and selection criteria and procedures that will apply to the selection of properties that will participate in RAD.⁷ Residents of properties proposed for participation in the demonstration must be given the opportunity to comment.⁸ Both of these comment provisions apply to conversion of public housing and other federally assisted housing. Moreover, for public housing conversions, the RAD opportunity for resident comment is in addition to the existing right for residents and the public to comment as provided in the PHA plan process.⁹ Unfortunately, RAD also states that conversions of public housing units shall not be subject to the public housing demolition and disposition statute, which has a required resident consultation provision.¹⁰ Further, RAD is silent as to

tenant comment for ongoing issues after conversions. Nevertheless, if public housing properties are converted to PBVs, the PHA plan process would continue to apply in accordance with current rules. However, if the property converts to a project-based Section 8 development, there is no mandate that the PHA Plan process continue to apply.

5. For converted public housing properties, the following conditions apply:
 - a. There is a priority for ownership of the converted property by a capable public entity or nonprofit.¹¹ RAD authorizes ownership by a for-profit in limited circumstances to facilitate the use of tax credits, so long as the PHA preserves an interest in the property.
 - b. HUD shall require long-term renewable use restrictions and affordability restrictions. To fulfill this objective, HUD must offer (subject to funding availability) and the owner must accept renewal of the subsidy contract.
 - c. If the contract is transferred to other units at the time of conversion or later, the contract must be subject to all of the aforementioned requirements regarding affordability and public ownership.
 - d. Applicants and tenants of converted units shall, at a minimum, maintain their rights to informal hearings, grievance procedures, and adequate notices of and good cause for eviction.¹² Residents shall also retain their rights under Section 9 of the United States Housing Act, which is the source of the rules regarding funding for resident participation.
 - e. RAD does not contain language stating that residents have the right to participate in a legitimate tenant organization, which shall be recognized by the owner. However, this is a requirement for any current Section 8 project-based development and would therefore be applicable to properties converted to project-based Section 8.¹³ Additionally, there is nothing to prevent the extension of this right to any properties that are converted to

⁵RAD does not permit the conversion of Section 8 Moderate Rehabilitation units authorized for single room occupancy by Title IV of the McKinney-Vento Homeless Assistance Act. As noted below, there are other restrictions on conversion of Section 8 Moderate Rehabilitation units.

⁶This restriction should be made applicable to the other forms of converted properties. As written it should eliminate problems created by the conversion process for public housing residents. It should mean that such tenants are treated as transfer families and not rescreened for prior criminal activity. Families with undocumented members converting from public housing to the project-based voucher program should not be denied continued occupancy. Tenants transferring to tax credit properties should not be considered over-income for the tax credit program or excluded from the unit because they are over-income for the Section 8 program.

⁷RAD may proceed after HUD publishes notices of its terms in the Federal Register.

⁸In prior versions of RAD, consultation with Resident Advisory Boards (RABs) was specifically mentioned, along with consultation with residents prior to selection of a particular property for conversion. Also, residents previously sought inclusion of language stating that there should be an opportunity for public comment. These issues can be raised again when HUD seeks comments on the proposed RAD rules.

⁹42 U.S.C.A. § 1437c-1 (Westlaw Nov. 18, 2011).

¹⁰42 U.S.C.A. § 1437p (Westlaw Nov. 18, 2011).

¹¹Prior versions of RAD stated that a contract for a converted property "shall not be terminated (even due to foreclosure or bankruptcy) except for termination and transfer by [HUD default or lack of funds.]" See Council of Large Public Housing Authorities, Legislative Draft of RAD, http://www.clpha.org/legislative_draft_of_rad. RAD does not contain the residents' request for a priority for ownership by residents. However, such ownership could be defined and prioritized within the priority for ownership by a nonprofit, assuming that resident ownership would be in the form of a nonprofit.

¹²This language is strengthened. Prior versions of RAD stated that the residents would have "equivalent" rights.

¹³24 C.F.R. pt. 245, subpt. B (2011).

a PBV contract, especially if such properties were formerly public housing, which also includes rights to organize and to be recognized.¹⁴

6. HUD may waive provisions of PBVs, such as the limits on the amount of voucher funds that may be dedicated to PBVs and the number of units that may be project-based for a particular conversion.¹⁵
7. HUD is required to assess and publish findings regarding the impact of the conversion on the preservation and improvement of public housing, the amount of private sector funds leveraged and the effect of conversion on tenants.
8. No new funds were appropriated for RAD. HUD had asked for \$200 million in the FY 2012 budget for RAD. The funds for RAD will come from the operating subsidy and the capital fund and will be transferred to the relevant Section 8 account. As stated by the Senate Report, "The result of these transfers will be cost neutral, since any increase to the rental assistance programs will be offset by reduction to the public housing programs. Importantly, increases and decreases will be directly related to the units of housing that are part of the demonstration. As a result, the changes should not adversely impact PHAs that continue to rely on the public housing programs."¹⁶
9. Rents to the owners of converted properties may be increased, but "only by an operating cost factor established by the Secretary and subject to appropriations."¹⁷

RAD's key elements regarding conversions of rent supplement, Section 236 Rental Assistance Program (RAP) and Section 8 Moderate Rehabilitation units (also known as the orphan programs) include:

1. For FY 2012 and FY 2013, RAD allows orphan properties that lost their rental assistance after October 1, 2006, to convert voucher assistance to the PBV program.
2. Before the conversion to PBVs may occur, the residents must be consulted and the administering PHA must agree to the conversion.
3. Some sections described above are applicable to the conversion of the orphan programs.¹⁸

¹⁴24 C.F.R. pt. 964 (2011).

¹⁵The waiver provision is quite broad and therefore could be subject to abuse. The waiver provision was further expanded in the final version of RAD by the removal of the terms "and not inconsistent with the requirements of RAD."

¹⁶S. REP. NO. 112-83, at 108 (2011) (Conf. Rep.). It is not clear how the dramatic reduction in the capital funds for FY 2012 will affect the feasibility of developments that PHAs may want to convert.

¹⁷H.R. REP. NO. 112-284, 157 CONG. REC. H7433, H7465 (2011) (Conf. Rep.).

¹⁸See in particular the discussion above of comments by the public

Conclusion

HUD will be seeking comments on draft rules implementing RAD, and it will be critical for advocates and residents to submit comments. Presumably HUD will act quickly, as RAD has been an initiative of the agency for the prior two years. There are elements currently missing from RAD that should be included in any rules. For example, the rules should be explicit as to:

- the resident rights that will continue to be the same in any converted public housing units;
- funding for resident participation;
- the need for broad notice and participation by the public in any decision to convert a public housing development;
- the conditions that HUD will apply in the situation of ownership by a public entity for tax credit purposes;
- resident protections in the event that the subsidy contract is transferred to another development.

Also, the appropriations bill does not mention RAD's mobility or choice feature. The mobility feature refers to the ability of a tenant in a converted property to move from the development, using a voucher, while the rent subsidy remains with the development. The Senate supported such a condition, but did not include language mandating mobility in RAD.¹⁹ HUD has told residents and others that it continues to be committed to implementing a mobility feature. Comments should be submitted to HUD regarding mobility and the RAD rules. ■

and residents and the cap on the total number of public housing and moderate rehabilitation units that may be converted.

¹⁹S. REP. NO. 112-83, at 109 (2011) (Conf. Rep.) ("The Committee supports the objective of offering public housing choice mobility as an important component of this demonstration in a manner that serves residents and provides flexibility for PHAs to work with HUD to determine how to meet this objective.")