

National Alliance of HUD Tenants

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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

April 23, 2012

Re: Docket No. FR-5630-N-02, "Rental Assistance Demonstration—Partial Implementation and Request for Comments"—published at 77 FR 14029 (3/8/12)

Dear Regulations Division, Office of General Counsel, HUD:

The National Alliance of HUD Tenants (NAHT) submits these comments on the Notice published in the Federal Register and the related PIH Notice 2012-18, "Rental Assistance Demonstration—Partial Implementation and Request for Comments," March 8, 2012.

Background. Since 1992, NAHT has represented the 1.7 million families in privately-owned, HUD subsidized multifamily housing. NAHT is the only tenant-led, national tenants union in the US today, with voting member tenant groups and areawide coalitions in 22 states. These comments were developed in several teleconference calls of NAHT's national network of local tenant groups and organizing projects, in consultation with allies and partners including the National Housing Law Project and the Preservation Working Group, and approved by the elected all-tenant NAHT Board of Directors.

Since its inception, NAHT has fought for the preservation of at-risk multifamily housing. Since 1996, when Congress dismantled the Title VI Preservation Program over NAHT's objections, the nation has lost more than 400,000 units of HUD multifamily housing to market rate conversions or HUD contract terminations. Over the years, NAHT has successfully proposed and advocated for policies and legislation to slow this loss, including the adoption of MAHRAA in 1997, the Mark Up to Market Program in 1999-2000, and the "Schumer-Bond" amendment requiring HUD to provide Project-Based Section 8 at HUD foreclosure or disposition of troubled housing. NAHT has supported the development of comprehensive Preservation legislation proposed by Rep. Barney Frank, including measures to promote the conversion of vouchers to project-based assistance to preserve housing, as a critical tool to Save Our Homes.

In 2010, NAHT strongly supported the features of Secretary Donovan's TRA/PETRA initiative that would consolidate the so-called "orphan" programs of Rent Supplement, RAP, and Mod Rehab Section 8 into a single model of project-based assistance, in order to reduce complexity and make HUD multifamily programs more transparent and uniform for HUD staff, tenants and owners alike.

NAHT role in passage of Merkley-Brown Amendment. When Congressman Frank's Preservation bill stalled in late 2010, NAHT played a lead role in the effort on Capitol Hill to salvage at least some elements of the bill in Appropriations legislation. In June 2011, at NAHT's Annual Conference, tenant leaders from Warren Hall in Brighton, Massachusetts and the Downtowner in Seattle Washington—both expiring "Rent Supplement" contract buildings—secured a commitment from HUD that HUD would

provide Tenant Protection Vouchers to all eligible units in these buildings. NAHT tenants also met with key Congressional Committee staff urging legislation to allow conversion of these subsidies to Project Based Vouchers.

In addition, NAHT's Massachusetts affiliate, the Mass Alliance of HUD Tenants (MAHT) successfully enlisted support from U.S. Senator Scott Brown to help save Warren Hall and some 2,400 similar apartments in Massachusetts. NAHT's Washington affiliate, The Tenants Union of Washington State, mobilized the Downtowner tenants to help obtain support by Sen. Patty Murray for this proposal as well. One result of NAHT's advocacy was the Merkley-Brown amendment, which lifted the "cap" on conversion of vouchers provided by HUD in expiring "orphan program" contracts in order to facilitate 100% preservation of Warren Hall, the Downtowner, and similar buildings, so these tenants can save their homes and communities as affordable housing.

With the encouragement of HUD, Congress located the Merkley-Brown amendment in the Rental Assistance Demonstration (RAD) program, to underscore the "preservation" intent of the amendment, since RAD was proposed and defended by Secretary Donovan as a way both to consolidate disparate programs (including the "orphan" multifamily programs), and to guarantee 100% preservation of "hard" units that participate in RAD as long term affordable housing. We were therefore surprised and disappointed that Parts 2 and 3 of Notice 2012-18 directly contradicts both the Congressional intent in passing Merkley-Brown, as well as Secretary Donovan's assurances about RAD.

Accordingly, we offer the following comments, primarily regarding Parts 2 and 3 of the Notice:

1) Allow conversion of 100% of Tenant Protection Vouchers (TPVs) or Enhanced Vouchers (EVs) issued by HUD at all expiring Rent Supplement and RAP buildings, and 100% of expiring Mod Rehab Section 8 buildings, to Project Based Vouchers (PBVs). The Merkley-Brown amendment specifically allows HUD to waive the 25% "cap" in the PBV program on the number of units in a building that can be converted to PBVs. HUD's Notice lifts this cap, but only up to 50% in the case of family developments, not the 100% intended by Congress.

In proposing a 50% cap on PBV's, the proposed Notice apparently reflects the view of some at HUD, as shared with the NAHT Board in recent meetings, that Congress originally intended the PBV program to be a "mixed income" housing program. Perhaps so. But Congress passed Merkley-Brown specifically to *amend* the PBV program in order to preserve as affordable housing buildings with expiring HUD contracts that have served as a HUD subsidized multifamily resource for 40 years. In contrast, the earlier PBV program was adopted, in part, to convert a portion of private apartment complexes that have never been subsidized to affordable, subsidized units, while simultaneously advancing mixed-income objectives where appropriate.

The Merkley-Brown Amendment was intended to provide HUD and owners the PBV tool to continue affordability in these expiring HUD Multifamily buildings where it would otherwise be lost, by leveraging private debt and equity needed to preserve these expiring use properties and retain project-based rental assistance units in the communities in which they are located. In the absence of a maximum stream of reliable subsidies, preservation buyers, lenders and investors are unlikely to get involved, and preservation goals will be frustrated. Already, a pending preservation purchase of Warren Hall in Massachusetts is in jeopardy because lenders, investors and potential purchasers cannot make a preservation deal work if no more than 50% of the units can qualify for PBVs.

In addition, removing the 50% cap for all units being converted under the RAD, including the units covered by the amendment, is also consistent with the Secretary's stated goal of consolidating and reducing complexity in HUD's rental housing programs, and with using RAD to preserve hard units of affordable housing for very low-income families, a commitment made repeatedly by Secretary Donovan, Assistant Secretary Henriquez, and Assistant Secretary Galante at HUD's 2010 "summit" meeting of resident leaders and subsequent meetings with the NAHT Board and others.

2) Clarify that all units initially offered TPVs or EVs by HUD and occupied by income eligible tenants 24 months prior to contract termination can be converted to PBVs. For "retroactive" conversions, the Notice states that only the units occupied by low income residents that *received TPV or EV assistance* and are still residing at the project may have assistance converted to PBV assistance. For properties that have recently received EVs or TPVs such as Warren Hall, for example, this is another limitation that would thwart the ability of a pending preservation owner/purchaser to convert the maximum number of units to PBV assistance.

At Warren Hall, in December 2011 HUD provided 33 Vouchers for all units in the development, occupied by 30 income-eligible tenants; another three units were vacant as of the date of termination of the Rent Supplement contract. However, only 11 tenants will be able to "use" their voucher in the building, because the pre-termination ceiling rent—extended by a state law through 2016—is very low (\$550/month); only 11 tenants below \$22,500 in annual income will get the "benefit" of a voucher (and lower rents) during the 120 window the vouchers are available from the Boston Housing Authority (BHA). The other tenants would have to leave the building (and pay a higher rent) in order to "use" the voucher. As a result, several income-eligible tenants who did apply to the BHA, and were offered TPVs, have no intention of leaving the building, so have declined the vouchers in order to continue benefiting from the low state-regulated rents. Other eligible tenants have declined to apply, for similar reasons. But if a preservation transaction is blocked due to reassignment of these vouchers by the BHA, these tenants will face certain displacement when state protections expire in 2016.

Consistent with the Notice, the BHA has already begun to reassign these 22 vouchers to its general voucher waiting list. Combined with the 50% limitation, the "received TPV" language in the Notice is a potential "deal breaker" at Warren Hall, where a preservation purchaser is interested in buying the building, but only if 100% or close to 100% of the units can receive PBV assistance. Given the imminent reassignment of these vouchers by the BHA away from Warren Hall, it is urgent that HUD amend the Final Notice to save these homes. It would be tragic indeed if the tenants who successfully fought to win vouchers for their building, then secure Senator Brown's support for the Merkley-Brown amendment, are denied these benefits and lose their homes in 2016.

To advance the preservation goal of the Amendment, the Notice should instead clarify that 100% of the TPVs or EVs provided by HUD for the units occupied by income eligible households 24 months prior to contract expiration be allowed to be converted to PBV by an owner, with tenant consent (where vouchers have already been issued), including cases where tenants have declined to "use" the voucher, were deemed temporarily ineligible, or did not apply. (The only exception should be where a tenant offered a TPV or EV has used it to move outside of the building.)

3) Clarify that vacant units can be converted, if originally eligible for Rent Supp/RAP/ModRehab. The Notice states that vacant units at the time of PBV contract execution will not be included in the PBV HAP contract. This should be changed; HUD should allow the

maximum number of TPVs which a property is originally eligible for to be converted to PBV assistance, to facilitate preservation objectives. In particular, eliminating units currently assisted under an existing Mod Rehab Section 8 contract, as the Notice proposes, is not a preservation strategy, nor consistent with the Secretary's commitments regarding housing preservation in RAD.

4) Require One Year Notice to tenants of expiring Rent Supplement and RAP contracts. HUD should utilize the mandate of Merkley-Brown to require owners to notify tenants one year in advance of expiring Rent Supplement and RAP contracts, similar to the notice requirements for expiring Project Based Section 8 contracts (including Mod Rehab Section 8). This Notice should be issued regardless of whether the owner intends to participate in the PBV conversion authority under Merkley-Brown, or to sell to a buyer who proposes to use this tool.

The Notice should explain to tenants the implications of the expiring contracts, HUD's provision of TPVs (or EVs in certain cases), tenants' rights under these programs, and the ability of owners to request conversion authority of 100% of the vouchers into PBVs. The owner's letter required by HUD should also notify tenants of the existence of any HUD funded Tenant Resource Network grantee in the area. This information would help enable tenants to organize and advocate for permanent preservation of their homes as affordable housing, if they choose, and to alert them to potential changes in their subsidy status in the property.

According to attorney James Grow from the National Housing Law Project, HUD has general rulemaking authority to implement its programs (42 USC 3535(d)): "The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties." HUD may also have specific rulemaking authority in the RAP and RAP statutes.

5) For all conversions, provide notice and allow tenants and legitimate tenant organizations to comment on the owner or buyer's conversion plans. The revised RAD Notice should provide for tenant participation in an owner or buyer's proposal to convert to Project Based Vouchers, in both prospective and retroactive conversions. Tenant comment should be invited both from individual tenants and from a legitimate tenants organization as defined by 24 CFR Part 245, Subpart B, and owners should be required to respond to the concerns of any tenants organization, as required under Part 245. For prospective conversions, support by 60% of the residents and a legitimate tenants organization, if any, should be sufficient to allow an owner to convert to PBVs. For retroactive conversions, since individual tenant consent to convert a TPV or EV to a PBV is already required, formal support would be moot, but comments should be welcomed by the tenants association in any case.

The revised RAD Notice should specify that owners who fail to provide the required Notice will be subject to Civil Monetary Penalties, applicable here while HUD mortgage insurance is still effective.

6) For prospective conversions, drop the requirement for individual tenant consent for conversion of TPVs to PBVs. For prospective conversions proposed by owners in Rent Supplement/RAP buildings, the Notice requires individual tenant consent for conversion of new TPVs to PBVs, in addition to general tenant support for the owner's plan. If HUD changes the Notice to allow owners to convert 100% of the TPVs issued by HUD to PBVs, and an owner plans to

do so, this requirement should be dropped. Individual tenants will still be able to exercise a mobility option in one year under the PBV program. Requiring individual tenant consent in prospective PBV conversions would unduly burden owners and tenants, and could undermine a tenant majority seeking to advance the goal of the Merkley-Brown amendment – the preservation of affordable housing.

7) Extend HUD’s Right to Organize regulations to Rent Supplement, RAP and Mod Rehab Section 8 buildings, and to PBVs generally. HUD’s final RAD Notice should clarify that the protections previously available to tenants in the Rent Supplement and RAP programs under 24 CFR Part 245 will be extended to buildings participating in the RAD Demonstration and/or converting to PBVs under Merkley-Brown. Tenants need and deserve these hard-won protections to respond to the widespread fear and intimidation by owners and managers of tenants who assert their rights, including their right to organize independently, that unfortunately persists in HUD housing.

Additionally, NAHT believes that the PBV program is currently covered by Part 245, since PBVs are a form of Project Based Section 8, and Congress extended Right to Organize coverage to Project Based Section 8 buildings in 1999. However, this is not explicitly stated in the PBV program regulations. Similarly, Mod Rehab Section 8 should be covered by Part 245 based on the 1999 statute, but this may not be clear to some HUD field offices or PHAs, since Mod Rehab contracts are administered by local PHAs and HUD PIH staff who are generally unfamiliar with Part 245.

HUD should use the opportunity afforded by the RAD program regulations to clarify that HUD Multifamily Right to Organize regulations (Part 245) apply to the Rent Supp, RAP and Mod Rehab programs, both before and after provision of TPVs or EVs, and to the PBV program generally, including conversions of “orphan” properties. (Buildings with EVs are explicitly covered by the 1999 statute and Part 245, but coverage by Part 245 is not clear where EVs or TPVs are converted back to project based assistance (PBVs), nor where Rent Supp/RAP buildings receive TPVs without a PBV conversion.)

Besides complying with the 1999 statute, this clarification would also further the Secretary’s goals of utilizing RAD to consolidate programs, establish consistency and simplicity, and affirm residents’ rights throughout the Demonstration Program.

8) Clarify that State Financed Rent Supplement buildings eligible for prepayment will receive 100% EVs. Section 3.61 of the Notice allows that in expiring RAP properties where an owner prepays an underlying mortgage in a state-financed building with HUD approval under Section 250 of the National Housing Act (thereby qualifying as “eligible low income housing”), all income eligible residents are eligible to receive EVs, and that all these residents should be considered in the count of units proposed for conversion to PBVs. This provision should be extended to state-financed buildings with Rent Supplement contracts also deemed eligible for prepayment, as HUD allowed in 2007 at Loring Towers in Salem, Massachusetts, in a preservation agreement negotiated with NAHT member groups (the Loring Towers Tenants Association and the Mass Alliance of HUD Tenants).

9) Require HUD to find a participating PHA for Mod Rehab PBV conversions, not just Rent Supplement and RAP buildings. The Notice appropriately gives HUD the authority to find a PHA with the capacity and willingness to administer PBV assistance in the case of Rent Supplement/RAP conversions, but not Mod Rehab. Not all Mod Rehab properties may be located in jurisdictions where the PHA has the experience, interest or capacity to administer the PBV program, as has already happened in Oregon. This inconsistency should be corrected in the final Notice, by extending to Part 2 the provision in Part 3.6.2 of the Notice requiring the HUD PIH Field Office

Director to make a reasonable effort to find a PHA with jurisdiction and administrative capacity willing to administer PBV assistance should the local PHA decline to participate.

10) Comments on Part 1 of Notice 2012-18. Part 1 of the Notice pertains to the Public Housing portion of the RAD. Generally, NAHT endorses and supports the recommendations submitted by the Resident Engagement Group (REG), a network of tenant leaders and partners from Public, Voucher and Multifamily Housing programs in which NAHT has participated for the past two years, representing HUD Multifamily tenants.

In addition, as in the preceding comment #8 above regarding applicable Right to Organize regulations, we note that the PIH Notice 2012-18 treats Public Housing conversions to Project Based Assistance (PBA) and Project Based Vouchers (PBV) differently, regarding which Right to Organize regulations apply. HUD proposes to apply the Part 245 regulations to buildings where PHAs convert to PBA, and 24 CFR Part 964, which governs tenants rights in Public Housing, to buildings that choose the PBV option under the statute. Presumably, this reflects a view that PBA is a HUD Multifamily program and hence should be covered by Multifamily Right to Organize regulations, but PBVs are a “Public Housing” program and hence should be governed by Part 964.

As a matter of statute, we believe this view is mistaken. Both PBA and PBV assistance are forms of Project Based Section 8. The Congressional extension of organizing rights to Project Based Section 8 in 1999, and the affirmation of these rights in Part 245, apply to both forms of project-based assistance. Therefore, Part 245 rights—especially the important requirement that a “legitimate” tenants association is one that is “completely independent” of owners and managers—including PHAs—should be extended to tenants in Public Housing developments converted under RAD.

At the same time, the *additional* rights afforded to Public Housing tenants under Part 964, such as rent grievance rights and access to \$25/unit in funding for tenant organizational activities, should *also* be made available to tenants in buildings that participate in the Demonstration, for *either* PBA and PBV conversions. Extending both Part 245 and Part 964 to tenants in Public Housing conversions to RAD would enhance tenants’ rights without diminishing any pre-existing benefits.

Extending the “best of both worlds” regarding tenants’ rights was a consistent recommendation from HUD’s PETRA meetings in 2010 and in subsequent discussions among tenants from all backgrounds in the Resident Engagement Group process. Providing coverage from both regulations to RAD participants would also help realize the Secretary’s vision of long term consolidation and simplification of disparate HUD programs, without diminishing tenants’ rights.

Similarly, HUD should consider extending certain aspects of Part 964 not now available to HUD Multifamily tenants, such as rent grievance protections and \$25/unit in funding, perhaps on an experimental basis, to HUD “orphan program” properties (Mod Rehab, Rent Supplement and RAP) that convert to PBVs under Parts 2 and 3 of the Demonstration.

Thank you for your consideration of these views.

Sincerely,

Michael Kane, Executive Director
National Alliance of HUD Tenants

