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HUD should make changes to the RAD rules to address some problems, confusion and weakness in the current rules and proposed documents. The following addresses issues regarding the notice and comment requirements, resident lease, grievance and eviction rights and resident participation and right to organize. Other issues may be addressed in a future memorandum.

As noted below, certain provisions must be included in tenant leases so as to avoid confusion and ensure that key rights are recognized and can be enforced. These provisions include notice periods in the event of eviction, the right to a grievance hearing to object to adverse action by the PHA and the owner, if different, and the right of residents to form a legitimate tenant organization and receive tenant participation funding.

Notice and Comment Requirements

PHA Plan Process: Advocates and residents supported HUD's proposal that conversion of a development requires a substantial amendment to the PHA Plan.¹ However, they argued that the timing of this engagement was too late for residents' concerns to shape the outcome of the Rental Assistance Demonstration (RAD) application and urged that the process occur prior to the submission to HUD of the initial application.²

In addition, advocates noted that although HUD recognized that conversion to Project-based Vouchers (PBV) allows the development to remain subject to the PHA Plan process, this is not the case with conversions to Project-based Rental Assistance (PBRA). Advocates and tenants argued that remaining subject to the PHA Plan process 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,³ 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

¹ Letter 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), 2 [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), 2 [hereinafter Tenant Comment Letter].

² *Id.*

³ The 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].

modification of the proposal.⁴ 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.⁵

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.⁶ 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 commencement of the PHA Plan process to occur so late in the RAD application process. Indeed, there are multiple arguments for early engagement of residents and the public including the fair housing implications of selecting a particular development rather than another. 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.⁷

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.⁸ 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.⁹ 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 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.¹⁰

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,

⁴ *Id.*

⁵ Tenant Comment Letter, *supra* note 1, at 3 and Advocate Comment Letter, *supra* note 1, at 2.

⁶ The financing plan is due 180 days following issuance of a Commitment to enter into a Housing Assistance Payment. Final Notice, *supra* note 3, at 60. The Initial Notice proposed that the PHA Plan amendment be submitted with the Financial Plan.

⁷ Final Notice, *supra* note 3, at 26. Any change in the distribution of units by bedroom size must be approved by the PHA Board as part of the approval of the application and noted as a significant amendment to the Annual Plan. Response to Public Comments Received on PIH Notice 2012-18, PIH Notice 2012-32, at 11 (July 26, 2012) [hereinafter Response].

⁸ Final Notice, *supra* note 3, at 47; Response, *supra* note 7, at 16.

⁹ *Id.*

¹⁰ Response, *supra* note 7, at 17; Final Notice, *supra* note 3, at 47 (meetings and materials regarding resident notification); *id.* at 19 and 67 (references the need for Language Access Plans (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).

HUD stated that it intends to provide more detailed information.¹¹ 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 tenants in developments slated for conversion, tenant commissioners or RAB members and facilitating their participation.

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.¹²

Issues related to PBRA conversions: HUD declined to make PBRA conversions subject to the PHA Plan process.¹³ Additionally, HUD did not adopt advocates' position that tenants in units converted to PBRA serve as resident representatives on the RAB or as a tenant commissioner.¹⁴ Nevertheless, HUD did state that the PHA could voluntarily include a resident of a property converted to PBRA on the RAB or the board.¹⁵

HUD should make the following changes to the RAD rules

Improvements to PHA Plan Process

- For RAD Applications submitted during the on-going, non-competitive period, PHAs should amend their PHA Plan prior to submitting the application.¹⁶ If HUD approves the application and issues a CHAP, the PHA Annual Plan should be amended so that the public, residents of the development and the RAB have notice and comment opportunities as the RAD proposal is more fully fleshed out.
- The list of minimal information that must be included in the PHA Plan should be expanded to address issues such as whether the anticipated conversion will be to PBV or PBRA and includes rehabilitation of the development, relocation of current residents, a change in ownership of the development and/or an application for tax credits.
- Significant changes to the RAD conversion process or Financing Plans, such as transfer of ownership or of assistance to another site or substantial changes in scope of work should require a substantial amendment to the PHA Plan.¹⁷

¹¹ Response, *supra* note 7, at 21-22.

¹² *Id.* The Final Notice, *supra* note 3, at 135 provides that if 50 percent of the tenants of a legacy development object HUD will discuss other options with the owner and consider rejecting the application.

¹³ *Id.* at 17.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ As set forth in the Final Notice, the conversion schedule allows for a 60 period after the CHAP approval for the PHA to submit evidence that the RAD proposal has gone through the PHA Plan Process. For the ongoing applications, requiring the PHA Plan amendment prior to the submission of an application should not lengthen the overall RAD process because the RAD proposal could either be considered within the PHA's regular Annual Plan process or by adding approximately 50 to 60 days at the beginning of the process, which period would be removed from the RAD schedule after the CHAP is approved.

¹⁷ The Final Notice, *supra* note 3, at 25-26 list the information that must be included in a substantial amendment including (1) a description of the units to be converted including the number and type of units, (2) any change in the number of units, (3) any change in bedroom distribution, (4) any change in the policies governing eligibility, admission, selection and occupancy and (4) if there will be a transfer of assistance at the time of conversion. It also provides that "any substantial change to the conversion plan is required to undergo the significant amendment process or other HUD review, if the

- Developments converted to PBRA should continue to be subject to the PHA Plan process. This is needed because if the units are subject to the PHA Plan process, tenants will have a forum to raise questions if the plans for rehabilitation are substantially changed, if relocation does not proceed as planned, if tenants are rescreened when they return or at the point of conversion, or if their legitimate resident organization is not recognized, etc. In addition it would permit residents at the converted site to continue to communicate with their fellow PHA residents in the public housing and regular voucher program about what has happened, and can help insure that there are comparable rights/procedures and help quell rumors that may bubble up about conversion. Also it may be of benefit to other future RAD conversions for residents to know what occurred, what lessons, etc. Finally it would avoid isolation and help to break down at the local level the silos created between the federal housing programs.

Involvement of residents of converting properties

- If more than 50 percent of the residents at a development proposed for conversion object to the conversion, HUD should consider rejecting the application.
- Residents at RAD developments (both PBV and PBRA), especially those who are members of legitimate resident organizations, should be able to select members to serve on the RAB.¹⁸ (This is most important for PBRA conversions if they remain subject to the PHA Plan process. However even if the PBRA units are not subject to the PHA Plan process, the residents of those developments may have a substantial amount of information and expertise to add to the RAD discussions, especially if other developments are considering conversion.)
- For PHAs with a tenant commissioner, who resides in a property converting to PBRA, the PHA should allow the tenant to serve out the term. When the tenant's term as a commissioner is expired or within three (3) years of the conversion, whichever comes sooner, a tenant commissioner who is a PHA program participant must be appointed (or elected) to the Board of Commissioners.

Limited English Proficiency

- HUD should determine for those PHA applications that have been approved, the language populations and their relative size served by the PHA and at the development proposed for conversion.
 - Depending upon the results of the determinations, the PHA should implement a Language Access Plan (LAP) that covers the identified language populations and provides for sufficient translation and interpretation for the PHA's LEP clients. If the PHA already has a LAP in place, then it should adjust its LAP accordingly.
- Require that a PHA, which is submitting an application for conversion during the ongoing period, notify HUD at the time of the application of the language populations and their relative size served by the PHA and at the converting development.

substantial changes involve a transfer of assistance, a change in the number of assisted units, or a change in eligibility or preference for new applicants.” (emphasis added) This is a helpful listing of what must be included in the substantial amendment. However if the conversion plan changes any of the listed substantial amendment items, those changes must go through the PHA Plan process. When changes are made later in the process, “other HUD review” may be in addition to the PHA Plan process but cannot substitute for it. There must be a formal way to engage the RAB and the public in significant changes.

¹⁸ In the absence of a jurisdiction wide resident council, public housing development resident councils have the right to select members to serve on the RAB. 24 C.F.R. § 903.13(b)(2).

- Identify and translate vital RAD documents, such as, (1) the lease or lease addendum to be used for PBRA and PBV developments; (2) a list of the rights of residents in converted properties;¹⁹ (3) the use agreement; and (4) the housing assistance payments contract.²⁰
- Determine if there are other HUD RAD “vital documents” that should be translated.²¹
- HUD should encourage the PHA to work cooperatively with any new development owners regarding outreach to LEP residents. For example, PHAs should be encouraged to share elements of their LAPs and any translated documents that may assist a new development owner in communicating with LEP residents more effectively.
- HUD should raise awareness among PHAs and new development owners that certain translated documents can be found on the HUD website.

Lease, Grievance and Eviction Rights

Advocates argued that tenants in converting properties have a right to certain notices in the event of an eviction, as per Section 6.²² Section 6 provides for adequate notice which shall not be less than (1) a reasonable period, not to exceed 30 days if the health and safety of other tenants, or PHA staff or others in the vicinity of the premises is threatened or in the event of any drug-related or violent criminal activity or any felony conviction, (2) 14 days in the case of nonpayment of rent, and (3) 30 days in any other case, except if State or local law provides for a shorter period of time. HUD responded to the eviction 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. For PBV the Final Notice reiterates the statute. However for PBRA, the Final Notice omits the reference to 30 days in any other case, except if State or local law provides for a shorter period of time.²³ There are tenants in some jurisdictions that rely upon the federal 30-day notice, because state law does not provide for a specific notice period in all situations. In addition, the final RAD notice does not state that these notice periods will be incorporated into PBV and PBRA leases. But HUD appears to be taking some steps in the right direction for conversions to PBV, as the rider to the PBV housing assistance payments (HAP) contract includes a reference to the 14-day and 30-day notices.²⁴ There is nothing similar in the HAP RAD contract for PBRA, except for a cross reference to the Final Notice, which as noted is incomplete and

¹⁹ HUD created a summary of the resident provisions. See Final Notice, *supra* note 3, at 73.

²⁰ HUD has provided translations in 10-13 languages of several vital documents, including the HAP Contract and the lease addendum (forms HUD 52641 and 52641A) for the tenant-based program and the model lease for subsidized programs (form 90105A). See HUDclips.org

²¹ These documents should include “any document that is critical for ensuring meaningful access to the recipients’ major activities and programs by beneficiaries generally and LEP persons specifically.” HUD, “Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,” 72 Fed. Reg. 2732, 2752 (Appendix B) (Jan. 22, 2007). The Guidance also notes that determining whether a document is vital “may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.” *Id.* The HUD LEP Guidance lists examples of vital and widely-used materials that may require translation for effective outreach to LEP clients, such as consent forms. *Id.* at 2744. HUD provides translated consent forms on its website. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/hud9a.

²² Advocates Letter, *supra* note 1 and Tenants Letter, *supra* note 1.

²³ The Final Notice uses different language regarding the 30-day notice for the PBRA and PBV program. Compare Final Notice, *supra* note 3, at 33 and 42; see also Response, *supra* note 7, at 32-33 (the additional requirements regarding termination notification were “erroneously omitted” from the initial notice).

²⁴ See 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].

therefore inaccurate.²⁵ It is critical that these notice periods be included in the PBRA tenant lease and are consisted with Section 6.

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 6.²⁶ However, full implementation of that obligation is lacking. In the final notice, HUD expanded the provisions relating to grievance rights, 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 (as owner)” action regarding the lease or with the contract administrator.²⁷ 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.²⁸

The grievance process for tenants in units converted to PBRA is also incomplete and confusing.²⁹ 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 (“as owner”), at which the tenant has a right to representation, to examine any evidence relied upon by the owner, and a written decision. Because of the lack of clarity regarding the term “PHA (as owner)” it is hard to understand the intent of the Final Notice. For example where the owner is not the PHA, the Final Notice states that the “PHA (as owner)” 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. Moreover, other critical elements of a public housing grievance hearing are missing, such as the definition of an impartial hearing officer,³⁰ that the owner cannot rely upon documents or material that were not provided to the tenant, that the tenant (and/or owner) may arrange to record the hearing and that failure to participate shall not waive any rights that a tenant may have to seek judicial action and that an adverse decision shall not prohibit *de novo* review in court.³¹ Also it is not clear whether the PHA or the owner of the converted property will conduct the hearing. We urge that the PHA conduct the hearing. Again there is no mention of including in the tenant’s lease the right to a grievance hearing for adverse action by the owner.

For both PBV and PBRA, the final notice uses the term “PHA (as owner)” without explaining the meaning of the term. To the extent that it means “the owner, which may be the PHA,” that should be clearly stated.

²⁵ Part II, Housing Assistance Payment Contract, Rental Assistance Demonstration (RAD) for the Conversion of Public Housing to Project-based Section 8, 7 [hereinafter HAP for PBRA] (states that the “PHA (as owner)” must send the 14 day notice). See discussion below regarding the term “PHA (as owner).”

²⁶ Response, *supra* note 7, at 32.

²⁷ Final Notice, *supra* note 3, at 33. The PHA will serve as the contract administrator for any public housing that is converted to PBVs. See Response, *supra* note 7, at 6.

²⁸ However, the rider to the PBV HAP contract states that the “owner” and the contract administrator must comply with the grievance process requirements, which is a partial step in the right direction. See Rider for PBV HAP, *supra* note 24, at 5.

²⁹ Final Notice, *supra* note 3, at 42-43.

³⁰ Typically HUD has defined an impartial hearing official as one who is other than the person who took or approved the adverse action or a subordinate of that person. See 24 C.F.R. § 966.55(b) and 982.555 (2012).

³¹ See, e.g., 24 C.F.R. §§ 966.55(b), 966.56 (2012). See also similar elements of the hearing for the voucher program. 24 C.F.R. § 982.555 (2012) (definition of an impartial hearing officer and owner may not rely upon documents that it did not provide to the tenant).

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.³²

HUD should make the following changes to the RAD rules

*Lease*³³

- For PBV and PBRA, include in the leases the right to not less than 14-day for an eviction for nonpayment of rent or a 30-day notice in any other case, except in the event of certain criminal activity or threats to health and safety for which a reasonable period of time, not to exceed 30 days may be given.
- For PBV and PBRA, include in the lease the right to a grievance hearing to object to any adverse action by the owner as well as the PHA.
- For PBV and PBRA, the lease ought to state that the owner must comply with all HUD rules, including PIH 2012-32, as may be amended.
- For the PBV, include in the lease the requirement to renew upon expiration, unless good cause exists to support the non renewal.³⁴

Hearing

- For PBV conversions, clarify in an amendment to the Final Notice that the hearing is applicable to adverse actions by the owner as well as the PHA.³⁵
- For PBV, clarify that the tenant is entitled to a decision from the hearing prior to the owner filing an eviction action or taking the proposed adverse action.³⁶
- For PBRA, clarify that a tenant is entitled to a hearing and a decision prior to the filing of an eviction action.³⁷ The Final Notice also ought to be clear that the owner cannot implement other proposed adverse actions, until after a final hearing decision.
- For PBRA, require the PHA (as opposed to the owner) or the contract administrator to conduct the hearing. The owner could be required to continue the current practice³⁸ under PBRA of the informal meeting prior to seeking an eviction to minimize the number of referrals.
- For PBRA if the owner conducts the hearing, include a definition of an impartial individual, clarify that in the hearing the owner cannot rely upon documents or material that was not provided to the tenant, that the tenant (and/or the owner) may arrange to record the hearing and that participation or failure to participate in the hearing shall not waive any rights the tenant has to seek judicial action or to de novo review in court.

³² Advocates Letter, *supra* note 1 and Tenant Letter, *supra* note 1.

³³ The lease also ought to reference the right to organize as mentioned in the next section of this memo.

³⁴ See Final Notice, *supra* note 3, at 32. HUD has issued a Rider to the PBV HAP with this correction. See Rider for PBV HAP, *supra* note 24, at 4.

³⁵ The Final Notice, *supra* note, 3 uses the term "PHA (as owner)" at 33-34.

³⁶ 24 C.F.R. § 982.555(a)(2) requires a hearing prior to termination of assistance, but does not address the issue of the timing of the hearing in the event of eviction.

³⁷ The Final Notice states that a tenant gets a hearing in the case of adverse action by the owner. Presumably that includes an action to evict, but the Final Notice does not make that statement for PBRA as it does for PBV. Compare Final Notice, *supra* note 3, at 34 (PBV rule provides "an opportunity of an informal hearing before an eviction") with 42 (PBRA rule provides a notice of proposed owner adverse action).

³⁸ See HUD Handbook 4350.3, ¶ 8-13B.

- For PBRA, any tenant should be entitled to a hearing to object to any adverse action taken by the PHA that affects a tenant converting to or residing in the PBRA development.³⁹
- For PBV and PBRA, make clear that property owners are bound by the hearing decision.
- For PBV and PBRA require two-step process (informal settlement followed by a formal hearing) for all.
- For PBV and PBRA allow a tenant to seek a hearing for owner inaction, so that complaints may be filed for example for failure to maintain the premises or for PBRA for failure to conduct an interim recertification of income and readjustment of rent.⁴⁰

Generally

- Clarify the meaning of the term “PHA (as Owner)”. We suggest that the term should be replaced with the phrase “owner, which may be the PHA”.

Resident Participation and Right to Organize

Right to Organize. HUD responded to advocates’ and tenants’ request for more detail regarding tenant participation rights for PBV tenants by repeating *nearly* verbatim the Part 245 regulations.⁴¹ 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 PBV HAP contract⁴² 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 rules⁴³ were not included for PBV conversions in the final notice. This language is necessary as the converting tenants will be losing the enforcement rights that they previously negotiated and are contained in the 964 rules.⁴⁴ In addition, the enforcement provisions of 245 were obtained by substantial advocacy by residents of project-based assistance and it would be significant to continue to recognize that effort.

HUD did include in the final notice instructions regarding what happens in the absence of a legitimate resident organization.⁴⁵ 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.

³⁹ The Final Notice states that the tenant may object to adverse action by the owner, but does not state that the tenant may request a hearing to object to adverse action by the PHA. Such adverse action by the PHA may include wrongful implementation of relocation obligations, inadequate physical inspections and/or approvals of rehabilitation and wrongful adjustments of the HAP contract or other activities related to the conversion.

⁴⁰ In accordance with 24 C.F.R. § 982.555(a)(1), the failure to conduct an interim recertification and readjustment at tenant request showing changed circumstances is subject, like any determination of income/rent, to informal hearing rights, and this is also a right under the Brook Amendment.

⁴¹ Final Notice, *supra* note 3, at 7.

⁴² Rider for PBV HAP, *supra* note 24, at 5.

⁴³ 24 C.F.R. § 245.135 (2012).

⁴⁴ See e.g., 24 C.F.R. §§ 964.130(c) and 964.150(a)(3).

⁴⁵ Final Notice, *supra* note 3, at 75-76.

Unfortunately, this obligation does not appear to impose any responsibilities on the PBV or PBRA owner. This omission should be corrected.

The Final Notice states that a PHA's 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.⁴⁶ But the notice did not address the question of whether a public housing jurisdiction-wide resident council may include representatives from converted properties and continue to be recognized as public housing jurisdiction-wide resident council. This issue must be clarified so that residents at the local level may determine the most effective way to organize at the local level.

Funding of Resident Organizations. The final notice provides for \$25 per unit per year, but unfortunately retained the reference to a minimum of \$15 for the tenant organization and \$10 for the PHA.⁴⁷ 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.⁴⁸ 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 ensure that the funds are made available. 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. 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 a legitimate tenant organization, upon the written request of the residents.⁴⁹ Again, it must be clear in the initial Financing Plan that these funds are reserved and available to the resident organization.

HUD should make the following changes to the RAD rules

Tenant organizations

- For those applications that have been approved, HUD should ask the PHA if there is a tenant organization at the site and if that organization complies (or could easily comply) with the 245 or the 964 regulations.
 - For all future RAD applications, HUD should require that PHAs submit information regarding resident councils and their contact information.
 - All tenants at a converting development should be informed of the availability of the \$25 for a legitimate resident organization.
- HUD should develop a form memorandum of agreement setting out the obligations of the parties and a sample budget that may be used by PBV or PBRA resident organizations that are receiving the tenant participation funding.
- The tenant lease should state that the tenants may form a legitimate resident organization in accordance with the 245 regulations (for PBRA conversions) and PIH Notice 2012-32 (for PBV conversions).
- HUD should be clear that if there is agreement at the local level between tenant organizations, an organization at a PBV or PBRA development may join or remain a member of the

⁴⁶ *Id.* at 18.

⁴⁷ Final Notice, *supra* note 3, at 75-78.

⁴⁸ *Id.* a

⁴⁹ *Id.* at 75-78.

jurisdiction-wide tenant council and the jurisdiction-wide tenant council will continue to be considered a duly elected tenant council and therefore recognized by the PHA.

Funding of tenant organizations

- HUD should retain the policy of PIH 2001-3 and require that the full use of the \$25 shall be determined by the PHA and residents.⁵⁰
- HUD should address funding issues so that if a resident organization forms after conversion, the organization is aware of and can access tenant participation funds.
- At a minimum, HUD should require that the Financial Plan state that the \$25/year/unit shall be set aside for the legitimate tenant organization and the funds if not distributed should be placed into an interest bearing escrow account for a legitimate resident organization.
 - It would be best if the escrow account were held by a party other than the owner, such as the PHA, if the PHA is not the owner, or an outside community group.
 - If contrary to the prior HUD directives as noted in footnote 48, the owner will retain the \$10/year/unit the guidelines regarding the expenditure of those funds should be spelled out.
- The tenants should be informed annually of their right to organize, be recognized and of the availability of the \$25/year/unit. The notice could be sent by the PHA, the owner or an outside community group that holds the escrow funds. The party who is obligated to send out the notice should be determined in the Financial Plan.
 - The value of the escrow account and distributions from it should be available, upon request.
- For PBV, change the language in the final notice to impose the tenant participation obligations on both the PHA and PBV owners and their agents. Also HUD should to incorporate the enforcement provisions from the Part 245 regulations (24 C.F.R. § 245.135).
 - It would be best if the 245 rules applied to PBV conversions, without any exceptions. This could be easily accomplished by adding PBV to the list of projects subject to the 245 rules and thereby modify section 245.5(a)(4).⁵¹

Compliance monitoring

- There will be key items that a contract administrator will have to monitor for converted units that will differ from the standard PBV and PBRA.
 - One area that the contract administrator must monitor and respond to complaints is issues relating to resident participation. For example, HUD should direct the contract

⁵⁰ 24 C.F.R § 964. 150, amended in 1994, allows for a \$15/10 split of the tenant participation funds between the tenant councils and the PHA. PIH 2001-3 requires that the tenants or the PHA and tenants jointly determine the full use of the \$25. PIH 2001-3 at 1 and 3. HUD anticipated that it was going to make further changes to 24 CFR Part 964 and stated that the PIH Notice 2001-3 would remain in effect until those changes were made. The operating subsidy rule at 24 C.F.R. § 990.190(e) provides for the \$25 and cross references to the 964 rules but independently makes no mention of the \$15/\$10 split. PIH 2011-51 at 19, references the \$15/\$10 split, but does not overrule 2001-3. Thus according to HUD rules, a duly elected or legitimate city-wide tenant organization determines how the funds will be equitably used and if there is no city-wide organization the tenant organization and possibly the RAB and the PHA jointly determine how the funds will be used. In accordance with PIH 2001-3 and the operating subsidy rule, neither the PHA or the owner has an absolute right to retain the \$10.

⁵¹ The 245 rules are derived from 12 U.S.C § 1715z—1b, which states that project owners shall not impede the reasonable efforts of tenants to organize. Section 1715z—1b is applicable to “a project which receives project-based assistance under section 8.” PBV developments fall within this definition and should be included within the protections of the 245 rules.

administrator to monitor and determine (1) whether the owner and the PHA are working together with the residents to determine appropriate ways to foster a constructive working relationship, in the absence of a legitimate resident organization, (2) whether the owner has recognized a legitimate resident organization, (3) whether the legitimate resident organization is receiving the \$25/unit/year and (4) whether the 245 rules and PIH 2012-32 is complied with, including whether the tenant organization is “completely independent of owners, management and their representatives.”

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