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May 10, 2016

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

Re: Docket No. FR 5913–N–07: “60-Day Notice of Proposed Information Collection for Public Comment Under the Paperwork Reduction Act—Rental Assistance Demonstration (RAD) Documents”

Dear Regulations Division, Office of General Counsel, HUD:

The following comments are submitted on behalf of the National Housing Law Project (NHLP) and the Housing Justice Network (HJN) regarding the 60-Day Notice of Proposed Information Collection published on March 17, 2016, entitled “Rental Assistance Demonstration (RAD) Documents.”¹

NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing the rights of low-income tenants and homeowners; and increasing housing opportunities for protected classes. Our organization provides technical assistance and policy support on a range of housing issues to legal services attorneys and other advocates nationwide. In addition, NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 1,000 community-level housing advocates and tenant leaders, many of whom practice in jurisdictions that have converted properties to RAD, are in the processing of converting properties to RAD, or wish to convert properties to RAD. HJN member organizations are committed to protecting affordable housing and housing rights for low-income families and individuals nationwide. Meaningful tenant involvement is fundamental to all affordable and public housing decisions, and the following comments draw upon NHLP and HJN’s extensive experience working for decades with advocates, residents, and public housing authorities (PHAs).

¹ 60-Day Notice of Proposed Information Collection for Public Comment Under the Paperwork Reduction Act—Rental Assistance Demonstration (RAD) Documents, 81 Fed. Reg. 14,473 (Mar. 17, 2016) (hereinafter “RAD Form Documents”).

RAD allows public housing, Mod Rehab, Rent Supp, and RAP properties the opportunity to enter into long-term Section 8 contracts in order facilitate the financing of necessary improvements. Participating PHAs and property owners are required to submit documentation (RAD Form Documents) in order to process and complete the RAD conversion. Through these RAD Form Documents, HUD evaluates whether the PHA or owner has met all of the requirements necessary to complete conversion as outlined in PIH Notice 2012-32 (REV-2), “Rental Assistance Demonstration—Final Implementation Notice” (hereinafter “RAD Notice”). The RAD Form Documents and information requested through such documents allow HUD to determine which applicants meet the eligibility and conversion requirements necessary for a RAD conversion. Additionally, the RAD Form Documents bind both the applicant and HUD, as well as set forth the rights and duties of both parties, for the converted RAD property in order to preserve affordable housing.

The RAD Form Documents are a critical part of ensuring the long-term affordability and tenant protections that are required by the RAD program. These documents also have the potential to provide the necessary transparency surrounding the terms of the RAD conversion, which is currently lacking in many RAD jurisdictions nationwide. HJN members and their tenant clients have experienced significant challenges in obtaining basic information about their local RAD conversion, and often have to resort to filing local public records act requests (which, in some cases, have still not obtained important information about the proposed conversion). We believe that this lack of transparency and collaboration undermines the requirements of the RAD program and slows down a time-sensitive conversion process. Our comments described below seek to ensure that the RAD Form Documents include the strongest long-term affordability protections, are used as key tools for tenant education and participation, and are publicly accessible for enforcement and transparency purposes.

I. Public Housing FHEO Accessibility and Relocation Checklist (First Component)

We strongly encourage HUD to expand the FHEO Checklist to include other fair housing issues beyond accessibility and relocation. Specifically, HUD should require PHAs to report the occurrence of and details relating to the following potential fair housing concerns:

- Any new construction (on an existing site or elsewhere);
- Any transfers of assistance (all or portion of the existing units);
- Any loss of units;
- Changes in the existing unit configuration (i.e. changing 3-bedroom units to 1-bedroom units);
- Changes in occupancy (i.e. changing from housing available to any qualified tenant to housing designated for seniors); and
- The racial and ethnic characteristics of the census tract and the metropolitan statistical area from the most recent Decennial Census, and the PHA’s suggested determination of whether the existing site (and if different, the proposed new site) is located in an area of minority concentration (based on the racial/ ethnic data for the census tract and metropolitan statistical area).

Including these other fair housing indicators on the RAD FHEO Checklist would help to provide a more accurate picture of the potential fair housing concerns triggered by the RAD conversion, which would assist in FHEO's RAD fair housing review. As part of this review, HUD should also inquire about what efforts the PHA has made to determine existing residents' preferences about new construction on the existing site or at new sites. Also, accessibility should be further defined in the Checklist, including citations to applicable laws, in order to ensure that PHAs can accurately evaluate whether the conversion of assistance will impact current accessibility.

Additionally, we strongly urge HUD to require a written relocation plan and involve tenants in the drafting process as part of this Checklist. Requiring a written relocation plan would create the opportunity for increased transparency and tenant participation in a critical part of the RAD conversion that directly affects tenants' living environment and quality of life. At the very least, Section III of the Checklist should require PHAs to explain how they have (and will continue to) educate and involve tenants in the relocation planning process, including attaching any materials that were distributed to tenants during the relocation planning process. Section III of the Checklist should also inquire about what efforts the PHA and/or RAD property owners took to minimize the need for temporary tenant relocation, why temporary relocation is necessary with the proposed level of property rehabilitation, and how the PHA will keep track of residents during relocation. Also, PHAs should be required to provide relocated residents with quarterly updates during relocation so that they have some sense about when they will return to the property. Written relocation plans should also identify the anticipated maximum number of vacancies that are required to carry out rehabilitation of the property and the time period for which units will be kept vacant. Some PHAs create vacancies in as many as 20% of the units in a property as far out as two years before RAD conversion. PHAs continue to receive subsidies for these units despite fewer people are being housed at a property that is still a PHA unit. Also, in describing the likely housing market and communities where tenants will relocate through HCV assistance, Section III of the Checklist should require PHAs to provide the current voucher success rates in the local community, including whether there is a local or state source of income law that includes HCVs as a protected source of income.

Finally, HUD should require PHAs to seek input from and make this Checklist available to tenants and local tenant advocates prior to submission and at any time thereafter upon informal request. Since the RAD program was enacted, tenants and their advocates have faced significant challenges, including a lack of good faith cooperation and transparency by PHAs, when trying to learn and become involved in the proposed RAD conversion. HUD should take affirmative steps to advance the transparency and tenant participation goals of the RAD program.

II. Financing Plan Template (First Component)

We strongly urge HUD to take steps to require evidence of tenant participation in the RAD conversion process as part of the Financing Plan submission, including the educational materials that were provided to tenants prior to and since the CHAP was issued. We propose adding "Evidence of Tenant Participation" as a separate requirement and section (#22) in the Financing Plan. This section should require PHAs to show evidence of tenant education and participation, that has occurred until this point, as well as future plans for tenant education and involvement,

including but not limited to tenant involvement in: planning discussions about any proposed demolition or reduction of units, changes in unit configuration, the scope of work and timeline for proposed rehabilitation or new construction, temporary relocation planning, transfers of assistance, changes in ownership, changes in rent levels, proposed changes to waiting list setup and procedures, and any programmatic or regulatory waivers that the PHA is seeking or has received from HUD or any state or local entity. Tenant participation and education is critical to a successful and enduring RAD conversion, especially as part of broader conversations around the community's aspirations for community development. PHAs should be held accountable for adequate and effective tenant education and participation during the RAD conversion process.

We also strongly encourage HUD to make the following changes to existing text in the Financing Plan:

- PHAs should be required to explain why there is any difference in the number of units under the ACC versus the number of units converting to RAD. Will those units be demolished and not replaced under the *de minimis* exception (greater of 5% of the number of units under ACC immediately prior to conversion or 5 units), have those units been vacant for more than 24 months at the time of RAD application, or will those units not convert to RAD because of a Section 18 demolition or disposition?
- PHAs should be required to provide the scope of work and expected costs (total and average per unit), including a narrative of the major rehabilitation or construction work that is expected to be done.
- If a PHA is seeking Section 18 approval, the PHA should be required to explain whether they are seeking demolition or disposition approval and how such approval would further the goals of the RAD program.

HUD should also require the PHA to indicate how and for how long it intends to preserve its interest in the property, preferably via ground lease.

Finally, HUD should require PHAs to seek input from and make this form available to tenants and local tenant advocates prior to submission and at any time thereafter upon informal request.

III. PBRA Housing Assistance Payments Contract Part I and Part II (First Component)

If the project owner fails for a continuous period of six months to have at least 90% of the assisted units leased or available for leasing by eligible families, HUD should *not* reduce the number of units covered by the HAP contract (Part II, page 7). This action by HUD would fail to preserve the vital, long-term affordability of the property and does not properly sanction the property owner for failing to abide by the HAP contract.

Additionally, we strongly urge HUD to amend the PBRA model lease, and require its use at all RAD properties nationwide, to include the key tenant protections under the RAD program (i.e. the right to remain/ return, no rescreening upon conversion, lease renewals, phase-in of tenant rent increases, relocation assistance, tenant participation, tenant grievance procedures, and choice

mobility). This would help to eliminate the wide variety of terms and formats of RAD property owner leases (Part II, page 6).

Third, any reports that are required by HUD or the PHA should also be required to be made available upon request and notification to current tenants (Part II, page 9). The HAP Contract should also require an investigation by HUD or the Contract Administrator if more than 20% of the current tenants, or the tenant organization, submit a request for such an investigation to the property owner, PHA, or HUD regarding issues relating to tenant participation or their living environment.

Also, HUD should remove the exclusion of third party beneficiary rights from the HAP Contract. Instead, a family that is eligible for housing assistance under the HAP Contract should be a third party beneficiary of the HAP Contract. This change would drastically improve enforcement, and reduce HUD's administrative burdens, in enforcing the terms of the contract. Making this change would also closely align with the RAD Use Agreement, which allows any eligible tenant or applicant for occupancy within the project, in addition to the HUD Secretary or his or her successors or delegates, to institute proper legal action to enforce performance of its provisions. It is critical that tenants have a tool to access justice in order to preserve their tenancy and ensure the long-term affordability of their property after RAD conversion.

We also encourage HUD to make the following changes to existing text:

- All references to Notice PIH 2012-32 (HA) should be revised to reference Notice PIH 2012-32 (HA) (REV-2) and all subsequent revisions to the RAD program through applicable statutes, regulations, and policies.
- The HAP contract should specify that RAD projects are also subject to the fair housing laws and definitions of protected classes under state and local law.

Finally, HUD should require PHAs to seek input from and make this document available to tenants and local tenant advocates prior to conversion and at any time thereafter upon informal request.

IV. PBV Rider to PBV HAP Contract (First Component)

We strongly urge HUD to require the RAD property owner to receive express written approval from HUD in order to transfer the contract or the project, which is required under the RAD PBRA HAP Contract, because such fundamental alterations should be part of HUD's important nationwide oversight role. Currently, the PBV HAP Contract only requires approval in "accordance with HUD requirements." Additionally, HUD should have stronger protections for transfers of member interests in ownership entities utilizing Low Income Housing Tax Credits. Transfer of investor members/ partners is not considered a default under the HAP contract or Use Agreement if HUD receives both prior written notice and copies of documents regarding transfer. Instead, there should be a requirement for prior written approval from HUD before owners can transfer these interests, which is currently required under the RAD PBRA HAP Contract.

Also, for RAD PBRA properties, the HAP contract continues in existence in the event of any disposition of the project or foreclosure, unless HUD uses its discretion to approve otherwise. We greatly support this strong protection of long-term affordability of RAD properties, and urge HUD to require the same for RAD PBV properties, or at the very least, develop guidelines about when and how it will exercise this discretion, in order to ensure the long-term affordability of RAD properties.

Additionally, we urge HUD to clarify how tenants will be protected in the event of foreclosure, bankruptcy, transfer of assistance, or substantial default. Can the HAP Contract and subsidy be quickly transferred to another owner or to another building? If necessary, will current tenants receive tenant protection vouchers and relocation assistance? The PBRA HAP Contract provisions are more explicit and protective of tenants than the PBV HAP Contract regarding the provision of replacement housing assistance, and we urge HUD to include similar strong tenant protections in the PBV HAP Contract as well.

Finally, HUD should require PHAs to seek input from and make this document available to tenants and local tenant advocates prior to conversion and at any time thereafter upon informal request.

V. RAD Conversion Commitment (First Component)

Because the issuance of the RCC indicates HUD's approval of the Financing Plan and approximately 30-90 days before closing, PHAs should be required to provide evidence of tenant education and participation that has occurred until that point, as well as future plans for tenant education and involvement, including but not limited to: tenant involvement in planning discussions about any proposed demolition or reduction of units, changes in unit configuration, the scope of work and timeline for proposed rehabilitation or new construction, temporary relocation planning, transfer of assistance, changes in ownership, changes in rent levels, proposed changes to waiting list setup and procedures, any programmatic or regulatory waivers that the PHA is seeking or has received from HUD or any state or local entity, and the role of and financial support logistics for legitimate tenant organizations moving forward. Tenant participation and education is critical to a successful and enduring RAD conversion, especially as part of broader conversations around the community's aspirations for community development. PHAs should be held accountable for adequate and effective tenant education and participation during the RAD conversion process.

Additionally, the RCC should indicate that 1) if an MTW agency chooses to convert assistance to PBRA under RAD, the converting RAD project(s) will no longer be included as part of the PHA's MTW program, and 2) if an MTW agency chooses to convert assistance to PBV under RAD, the converting RAD project(s) will continue to be included in the PHA's MTW program, subject to the observance of RAD requirements as set forth in applicable statutes, regulations, and policies.

Finally, HUD should require PHAs to seek input from and make this document available to tenants and local tenant advocates prior to conversion and at any time thereafter upon informal

request. This should include exhibits about special conditions, sources and uses of funds, monthly HAP contract rents, scope of work, and closing preparations.

VI. RAD Use Agreement

HUD or the Contract Administrator has the discretion to terminate the HAP contract for owner breach, and after termination, HUD may release owners from the Use Agreement. We strongly urge HUD to develop guidelines about when and how it will release owners from the Use Agreement, in order to ensure the long-term affordability of RAD properties.

Additionally, the absence of guidelines governing HUD's discretion to approve exceptions to the automatic renewal of Use Agreement terms, as HAP contracts are extended, raises risks to the long-term affordability of a development. We strongly urge HUD to develop guidelines about when and how it will exercise this discretion, in order to ensure the long-term affordability of RAD properties.

We also urge HUD to require deeper affordability for rents for assisted units if the HAP Contract is terminated. Currently, where the HAP contract is terminated by HUD or an administrator for breach, the Use Agreement only requires that new tenants have incomes at or below 80% of AMI at admission and rents must not exceed 30% of 80% of AMI for an appropriate-sized unit. This weak restriction contrasts sharply with the 30% of actual tenant income standard applicable to public housing and Section 8, is virtually meaningless because rents do not generally reach that level in most rental housing markets, and is waivable. This means that the Use Agreement currently depends primarily upon the existence of the HAP contract for its vitality. In case of HAP Contract termination, deeper affordability restrictions should be incorporated into the Use Agreement in order to truly ensure long-term affordability.

Also, if the project owner fails to rent a sufficient percentage of assisted units to low income or very low income tenants, HUD should not, in its sole discretion, reduce the number of units covered by the HAP contract. This action by HUD would fail to preserve the vital, long-term affordability of the property and does not properly sanction the property owner for failing to abide by the HAP contract.

Finally, HUD should require PHAs to seek input from and make this document available to tenants and local tenant advocates prior to conversion and at any time thereafter upon informal request.

VII. PBRA Housing Assistance Payments Contract Part I and Part II (Second Component- Mod Rehab, Rent Supp, and RAP properties)

HUD should take steps to reevaluate the length of the owner's commitment under Second Component conversions to align with the mandatory HAP Contract renewal requirements of the First Component. For example, as stated in the PBRA Housing Assistance Payments Contract for the RAD First Component conversions: "The Owner acknowledges and agrees that upon expiration of the initial term of the Contract, and upon expiration of each renewal term of the

Contract, the Owner shall accept each offer to renew the Contract, subject to the terms and conditions applicable at the time of each offer, and further subject to the availability of appropriations for each year of each such renewal.” The current PBRA HAP Contract for the RAD Second Component conversions only mentions each renewal term in accordance with the HAP Contract, Notice PIH 2012-32 (HA), all statutory requirements, and all HUD regulations and other requirements. In order to ensure clarity and long-term affordability of the converted RAD Second Component property, HUD should explicitly state the language quoted above.

Additionally, we strongly urge HUD to amend the PBRA model lease, and require its use at all RAD properties nationwide, to include the key tenant protections under the RAD program (i.e. the right to remain/ return, no rescreening upon conversion, lease renewals, phase-in of tenant rent increases, relocation assistance, tenant participation, tenant grievance procedures, and choice mobility). This would help to eliminate the wide variety of terms and formats of RAD property owner leases (Part II, page 6).

Third, any reports that are required by HUD or the PHA should also be required to be made available upon request and notification to current tenants (Part II, page 9). The HAP Contract should also require an investigation by HUD or the Contract Administrator if more than 20% of the current tenants, or the tenant organization, submit a request for such an investigation to the property owner, PHA, or HUD regarding issues relating to tenant participation or their living environment.

Also, HUD should remove the exclusion of third party beneficiary rights from the HAP Contract. Instead, a family that is eligible for housing assistance under the HAP Contract should be a third party beneficiary of the HAP Contract. This change would drastically improve enforcement, and reduce HUD’s administrative burdens, in enforcing the terms of the contract. Making this change would also closely align with the RAD Use Agreement, which allows any eligible tenant or applicant for occupancy within the project, in addition to the HUD Secretary or his or her successors or delegates, to institute proper legal action to enforce performance of its provisions. It is critical that tenants have a tool to access justice in order to preserve their tenancy and ensure the long-term affordability of their property after RAD conversion.

We also encourage HUD to make the following changes to existing text:

- All references to Notice PIH 2012-32 (HA) should be revised to reference Notice PIH 2012-32 (HA) (REV-2) and all subsequent revisions to the RAD program through applicable statutes, regulations, and policies.
- The HAP contract should specify that RAD projects are also subject to the fair housing laws and definitions of protected classes under state and local law.

Finally, HUD should require PHAs to seek input from and make this document available to tenants and local tenant advocates prior to conversion and at any time thereafter upon informal request.

VIII. PBV Rider to Existing PBV HAP Contract (Second Component)

Similar to the language stated on page 6 of the PBV Rider for RAD First Component properties, we strongly urge HUD to incorporate tenant participation rights into this Second Component rider that protects tenants' right to participate and receive funding for legitimate resident organizations. This language should reflect the language and rights discussed in Attachment 1B of Notice PIH 2012-32 (REV-2). Although the RAD Notice does not explicitly discuss RAD Component 2 tenants' participation rights, these rights are independent rights that exist in the PBV program including and beyond RAD conversions.²

Also, for RAD PBRA properties, the HAP contract continues in existence in the event of any disposition of the project or foreclosure, unless HUD uses its discretion to approve otherwise. We greatly support this strong protection of long-term affordability of RAD properties, and urge HUD to require the same for RAD PBV properties, or at the very least, develop guidelines about when and how it will exercise this discretion, in order to ensure the long-term affordability of RAD properties.

Finally, HUD should require PHAs to seek input from and make this document available to tenants and local tenant advocates prior to conversion and at any time thereafter upon informal request.

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD and are happy to further discuss our suggestions. Please contact Jessica Cassella (jcassella@nhlp.org) should you wish to talk with NHLP and/or HJN members to clarify our position on these important issues.

Sincerely,

Jessica Cassella, National Housing Law Project

² Because PBVs are project-based rental assistance, they are covered under the tenant participation mandate in multifamily housing. First, PBVs are provided for in 42 U.S.C. § 1437f(o)(13), a subsection of Section 8 of the United States Housing Act of 1937, under the heading "PHA project-based assistance." In the Section 8 statute, 42 U.S.C. § 1437f(f)(6), Congress defines "project-based assistance" as "rental assistance under subsection (b) that is attached to the structure pursuant to subsection . . . (o)(13)." Second, in 1998, Congress expanded the scope of its tenant participation mandate in multifamily housing to include, among other properties, "a project which receives project-based assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f). . . ." Pub. L. No. 105-276, § 599, 112 Stat. 2660 (1998). In 2000, HUD issued final regulations implementing the 1998 amendment. 65 Fed. Reg. 36272 (June 7, 2000) (amending 24 C.F.R. pt. 245). Among other things this rule (§ 245.10(a)(4)) extended coverage to projects that receive "project-based assistance under section 8 of the United States Housing Act of 1937 . . .". 24 C.F.R. § 245.10(a)(4); see also HUD Housing Notice H2012-21, § (B)(4).

On behalf of HJN:

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