Comments on HUD's Demolition/Disposition Proposed Rule

Submitted By

Council of Large Public Housing Authorities (CLPHA)
National Association of Housing and Redevelopment Officials (NAHRO)
Public Housing Authority Directors Association (PHADA)
Reno & Cavanaugh, PLLC

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We appreciate the opportunity to comment on the Federal Register notice entitled "Public Housing Program: Demolition or Disposition of Public Housing Projects, and Conversion of Public Housing to Tenant-Based Assistance; Proposed Rule," published on October 16, 2014, at Docket No. FR-5399-P-01 (the "Proposed Rule"), which would revised the existing regulations governing the demolition and disposition of public housing projects at 24 CFR Part 970 (the "Existing Rule"). We also appreciate that considerable time and effort have gone into this process and acknowledge that the Proposed Rule makes some important improvements. Nevertheless, we also have some significant criticisms of the Proposed Rule and believe that HUD has departed significantly from the governing statute in a number of areas, circumvented express Congressional intent to repeal the one-for-one replacement requirement, and added requirements which are unnecessarily burdensome or which actually interfere with the mutual goal of public housing authorities ("PHAs") and HUD of improving affordable housing opportunities for low-income families and seniors.

1. Statutory Basis for Proposed Rule

Section 18[1] of the U.S. Housing Act of 1937 (the "1937 Act") provides as follows:

"(a) Applications for demolition and disposition

Except as provided in subsection (b) of this section, upon receiving an application by a public housing agency for authorization, with or without financial assistance under this subchapter, to demolish or dispose of a public housing project or a portion of a public housing project (including any transfer to a resident-supported nonprofit entity*), the Secretary shall approve the application, if the public housing agency certifies*--

[1] 42 U.S.C. 1437p.

(1) in the case of--

(A) an application proposing demolition of a public housing project or a portion of a public housing project, that--

(i) the project or portion of the public housing project is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes; and

(ii) no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life . . .

(2) in the case of an application proposing disposition by sale or other transfer of a public housing project or other real property subject to this subchapter--

(A) the retention of the property is not in the best interests of the residents or the public housing agency because—

(i) conditions in the area surrounding the public housing project adversely affect the health or safety of the residents or the feasible operation of the project by the public housing agency; or

(ii) disposition allows the acquisition, development, or rehabilitation of other properties that will be more efficiently or effectively operated as low-income housing;

(B) the public housing agency has otherwise determined the disposition to be appropriate for reasons that are -

(i) in the best interests of the residents and the public housing agency;

(ii) consistent with the goals of the public housing agency and the public housing agency plan; and

(iii) otherwise consistent with this subchapter . . ." *(emphasis added).*

2. <u>General Comments on Proposed Rule</u>

The provisions of Section 18 indicate a clear Congressional intent to defer to the judgment of a local PHA to determine whether an existing public housing project should be removed from the inventory through demolition or disposition. The language says that HUD "shall" approve such an application if the PHA certifies certain things and provides only narrow circumstances for HUD to disapprove an application. It is important to point out that the context in which these provisions were enacted was the Quality Housing and Work Responsibility Act of 1998[2] ("QHWRA"), a bipartisan piece of legislation that also streamlined the public housing and Section 8 programs in various ways and granted deference in planning and program implementation decisions in many other areas to PHAs, subject to a local consultation and review process. The PHA Plan required under Section 5A of the 1937 Act substituted a

[2] Veterans Affairs and HUD Appropriations Act, PL 105–276, Oct. 21, 1998, 112 Stat 2461.

local planning and review process through public hearings and consultation with residents, the community and local government, in place of detailed HUD oversight of most PHA decisions. The importance of the PHA Plan process is reflected in the reference to it, above, in Section 18. It is also consistent with Section 2 of the 1937 Act, as added by QHWRA, which provides as follows:

``(a) Declaration of Policy.--It is the policy of the United States--

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this Act . . .

> (C) consistent with the objectives of this title, to vest in public housing agencies that perform well, *the maximum amount of responsibility and flexibility in program administration*, with appropriate accountability to public housing residents, localities, and the general public . . ."

Yet, in implementing Section 18 in recent years and in this Proposed Rule, HUD has taken steps that are inconsistent with that Congressional intent, placing additional burdens on PHAs to justify their choices beyond what the statute requires, and leaving PHAs with fewer tools to improve their affordable housing stock. In a number of places, the Proposed Rule seems to imply that PHAs have inappropriate motives to simply reduce or eliminate their public housing projects or to wring value out of them and use the proceeds for unauthorized purposes. Of course, nothing could be further from the truth. Section 18 and the demo/dispo regulations are simply a process that PHAs use to manage their assets with the goal of preserving and recapitalizing affordable housing. PHAs, as creatures of state law, have a statutory mission to provide affordable housing and other opportunities to low income families and seniors. For many years now, given federal budget constraints, HUD has encouraged PHAs to carry out their mission by being more entrepreneurial, adopting asset management practices used in the private sector, and partnering with developers, lenders, and investors to raise funds for public housing redevelopment projects. These partnerships often require the demolition and/or disposition of existing projects so that new affordable housing can be developed to serve PHA residents. This Proposed Rule does not seem to be designed to encourage such practices and is therefore inconsistent with HUD's own policy direction. Instead, throughout the discussion in the preamble to the Proposed Rule, there is a theme that, notwithstanding the statute's clear deference to PHAs, PHA decisions must be second-guessed and that the problem with the Existing Rule is an insufficient amount of information submitted, consultation with residents, public process, and HUD review.

Further, HUD itself is promoting as one of its very highest legislative and policy priorities, the Rental Assistance Demonstration ("RAD") program through which existing public housing projects are converted to Section 8 assistance. The conversion of a public housing project through RAD is explicitly exempt from demo/dispo requirements, regardless of whether it involves a transfer of the project to a new, private owner or the complete demolition and reconstruction of the project on the same or another site. Another flagship program, the Choice Neighborhoods Initiative ("CNI"), as HOPE VI before it, also is not subject to demolition rules. Similarly, the Mandatory Conversion and Voluntary Conversion programs, which also promote the conversion of public housing to Section 8, are exempt. Interestingly,

however, the Proposed Rule seeks to impose the demo/dispo regulations on mixed-finance projects, despite the current exemption afforded to mixed-finance projects under the Existing Rule and the exemptions provided to these other redevelopment programs.

In many other ways as well, HUD and Congress have shown a clear policy preference for Section 8 vouchers over public housing through the federal budget and appropriations process. Even in the depths of the recent budget sequester, all tenant-based vouchers in use were renewed, while public housing funding was cut severely. Further, over the years, HUD has not requested and Congress has not funded public housing operating and capital needs at a level that even comes close to the levels called for by HUD's own funding formulas. The public housing capital backlog approaches $30 billion, as HUD knows and recites in its efforts to promote RAD. While RAD has received vigorous support from a large segment of the public housing community, we all know that the number of authorized RAD slots is limited and also that RAD as currently enacted will not work everywhere, largely due to the rent cap imposed by the RAD statute. RAD is an important tool for PHAs, but we also need to be able to continue with the mixed-finance and other types of redevelopment efforts which have done so much for almost twenty years now to transform the nation's public housing stock.

We raise these points about the longstanding trend of converting from public housing to Section 8, including through RAD, because they stand in contrast to the Proposed Rule. Despite all of these other policies promoting creativity in redeveloping public housing and converting a substantial portion of it to Section 8, the Proposed Rule in some ways actually makes it more difficult to address the redevelopment needs of properties which remain in the traditional public housing program, in whole or in part. In our view, HUD is on the wrong track in that way. If funding for public housing operations, repair, or redevelopment were more plentiful, as it once was, then we strongly suspect that HUD would not be attempting to so narrowly interpret the statute and add procedural requirements and layers of review which will discourage PHAs from pursuing demolition or disposition. This Proposed Rule and HUD's notices and policies which precede it appear to be a response to the extreme public housing funding cuts and Section 8 voucher caps that PHAs have experienced in recent years and embody a policy shift from redeveloping and replacing inadequate public housing projects, with Section 8 vouchers as a lubricant, to keeping those projects up and in the inventory for as long as possible, even after their useful life has expired. We think it is misguided for HUD to narrow and slow down the redevelopment pipeline and that HUD should, instead, partner with PHAs to advocate for the necessary funding and identify new resources to carry out our joint mission. Additional meetings, PHA certifications, and HUD review will not improve housing conditions for the low-income families and seniors we serve. Only adequate funding and flexibility for PHAs consistent with the statute will do that.

3. HUD's Current Demo/Dispo Policies and the Proposed Rule

For the Proposed Rule, and these comments, to be understood in context, and as they relate to PHAs' "real world" experiences in seeking to redevelop our country's aging public housing stock, the discussion must begin with HUD's current policies and practices that govern demolition and disposition applications. Those policies and practices are set out in Notice PIH 2012-7 (HA) issued February 2, 2012 (the "Notice").

The Notice contains several provisions that have constricted, limited and/or outright prohibited demolition or disposition activities by PHAs, and which we believe are contrary to either the plain language or clear legislative intent of the Congress as reflected in Section 18 and in the Existing Rule. These provisions have blocked demolition and/or disposition activities by many PHAs seeking to improve, modernize and replace their public housing inventory

Unfortunately, the Proposed Rule appears to leave intact several of these provisions or, in some respects, make them worse. The Proposed Rule also fails to address certain requirements set forth in the Notice, thereby leaving in question the applicability of those requirements.

It is important to point out that the Notice was adopted without prior publication of notice and opportunity for comment in the Federal Register. We fear that if the Proposed Rule is adopted without addressing the concerns detailed below that HUD may repeat its earlier actions and simply adopt a notice outside the rulemaking process to impose additional, and perhaps even more restrictive, requirements on PHAs seeking demolition or disposition, as was the case with the Notice.

Thus, a discussion and understanding of the Notice and HUD's policies surrounding it is an essential foundation for these comments and to vocalize our concerns for future HUD action on this topic.

a. Legal and Policy Problems with the Notice

We have identified the following specific aspects of the Notice that are inconsistent with the specific language and/or the intent of Section 18 and HUD's published regulations, as well as the rulemaking requirements of the Administrative Procedures Act[3] ("APA"):

- Elimination of Case-by-Case Evaluation of Disposition Applications. The Notice eliminates the individual, case-by-case consideration of disposition applications required by Section 18 and the Existing Rule, and instead establishes a categorical, policy-based standard for rejection of certain types of disposition applications.
- Categorical Denial of Disposition Applications Citing Insufficiency of Public Housing Funds. The Notice requires disapproval of all disposition applications that cite insufficiency of public housing funds as the basis for the requested disposition, explaining that these applications will be categorically denied because HUD has determined that "alternative resources" are available that offset any such insufficiency.
- One-For-One Replacement of Public Housing Units in Dispositions. Despite clear Congressional intent to the contrary, HUD's current policy in implementing the Notice is to deny any application for disposition unless the application contemplates replacement of the public housing units on a one-for-one basis unless the application can establish obsolescence (which is not a standard for disposition).

[3] 5 U.S.C. § 553

- Rigid and Unreasonable Standards for Obsolescence and Modification Costs in Demolitions. The Notice sets out an obsolescence standard for modification costs that focuses only on the most minimal and basic repairs, and weighs the cost of these against replacement of the entire project for determining whether to approve a demolition.

- Notice Adopted Without APA-Required Rulemaking. The foregoing substantive restrictions and requirements imposed by the Secretary on demo/dispo applications for the past, nearly three years, constitute legislative rules within the meaning of the APA, and should have been adopted pursuant to agency rulemaking consistent with the 1937 Act.

Each of the these problem provisions, and HUD's failure to correct them in the Proposed Rule as discussed below, has combined to eviscerate the demo/dispo authority created by Congress.

1) Categorical Denial of Certain Disposition Applications

Two intricately related substantive questions are raised by this aspect of the Notice. First, was it lawful for HUD to change the disposition application process from an individual, case-by-case approval analysis as contemplated by the Congress to a categorical denial of applications without any individual assessment? Second, even if HUD may have had this authority, was the Notice a proper means of implementing it? We answer both in the negative.

The starting point of this inquiry is Section 18 itself and the question of whether Congress "has spoken to the issue;" indeed, it has. The relevant provisions of Section 18 are included at Section 1 of these comments and describe the implementation method for the statute—individual applications—the standard for their approval and a parallel standard for their disapproval.

Indeed, the language of the statute on this point is so clear, and apparently unequivocal, that HUD adopted it nearly *verbatim* in 24 CFR 970.17, which states that HUD "**will** approve an application for disposition . . . if the PHA certifies that retention of the property is not in the best interests of the residents or the PHA for at least one of the following reasons . . . " (emphasis added). Even the Notice itself acknowledges, in Section 10, the case-by-case analysis requirement of Section 18 and the Existing Rule, stating that "HUD reviews PHAs' certifications and narratives, along with other information that is available or requested by HUD, **on a case-by-case basis** to determine if the certifications meet the criteria of Section 18 of the 1937 Act and 24 CFR part 970." (emphasis added).

Taken together, the statute, the Existing Rule, and the Notice itself all consistently and uniformly require analysis of the PHA's certifications, and any other information available to or requested by HUD as it may pertain to the particular application, on an individual, case-by-case basis. However, this is not how HUD has applied these provisions in the case of disposition applications on the basis of insufficient public housing funding.

The language of Section 18 provides the basis for approval of disposition applications. While Congress

could have directed HUD to issue regulations containing additional substantive standards for approval of a disposition application, or to determine categorically which kinds of applications HUD would approve or not, but it did not. Rather, it instructed HUD to make a decision on each application based on the merits of the application, applying the standards of the 1937 Act to the certifications of the PHA.

Parallel to the approval standard, HUD is authorized under the 1937 Act to disapprove an application **only** if it determines that any of the required certifications made by the PHA are "clearly inconsistent with information and data available to the Secretary," or if the application fails in some other way to satisfy the procedural requirements of the law. Section 10 of the Notice preempts this individual merits consideration of an application when the PHA rests its certifications upon insufficient funding and, instead, instructs that HUD will arbitrarily issue a uniform disapproval of any application based on such certifications. This is contrary to Congress's direction in Section 18.

When HUD published the Notice, no explanation was included of why the case-by-case analysis was eliminated, other than the cryptic, conclusory comment in Section 10(A) of the Notice that approval of **any** disposition application on the basis of insufficient funding would be "inconsistent with the 1937 Act in light of alternative resources." And, although the Notice refers to several programs or sources that are supposedly "alternative resources," it does not articulate any basis or reason for why, how, or in what measure those programs excuse or modify the statutory mandate for case-by-case analysis disposition approval. Indeed, some HUD officials have stated publicly, though not in writing, that the Rental Assistance Demonstration ("RAD") program is not intended to close off the ability of PHAs to obtain HUD approval of disposition applications.

More specifically, nothing in the Notice addresses how these supposed alternative resources could, and would, **in every single application** rise to the level of meeting the disapproval standard set out in 24 CFR 970.29:

> "HUD will disapprove an application if HUD determines that:
>
> (a) **Any certification** made by the PHA under this part **is clearly inconsistent** with:
>
> . . .
>
> (2) Any information and data available to HUD related to the requirements of this part, such as failure to meet the requirements for the justification for demolition or disposition as found in Sec. 970.15 or Sec. 970.17; or
>
> (3) Information or data requested by HUD." (emphasis added).

The statute and published regulation are thus clear on both the case-by-case procedure and the standard for disapproval. The Notice essentially eviscerates both without explanation or identification of the factors considered by HUD or its rationale when the Notice was adopted. The Proposed Rule does not address this fundamental problem created by Section 10(A) of the Notice. This "categorical"

standard for rejection of all such applications, without an analysis of the applications on a case-by-case basis relative to the facts and impacts of underfunding in the specific instance, violates the requirements of the 1937 Act and the Existing Rule as discussed in the following sections.

2) "Alternative Resources" Rule

We refer to the language in Section 10 of the Notice as a "rule" because HUD essentially adopted this as a legislative rule without the formalities of notice and comment rulemaking, and has substituted that rule for the case-by-case analysis contemplated by Section 18 and the Existing Rule.

Section 18 describes the case-by-case application review and determination and instructs HUD to approve demo/dispo applications supported by the required certifications **unless** those certifications are "clearly inconsistent" with "information and data" available to or requested by HUD, the latter presumably requested from the PHA applicant. The statute requires that any consideration by HUD of such "information and data" must be carried out in the context of a review and decision on an individual application. So, while HUD does have explicit authority under the statute to consider "alternative resources" within this broad description of "information and data available to HUD", the question turns to **how** HUD may consider it.

Under the Notice policy, HUD exercised the authority to consider "information and data" available to him by adopting an arbitrarily applicable rule that, in **every** case of a disposition application, the information and data "available" to him regarding so-called "alternative resources" would be "clearly inconsistent" with any certification made by an applicant PHA based upon insufficiency of funding. This "rule," became the rationale for HUD's elimination of a case-by-case analysis of whether any alternative resources are actually available to a particular applicant in connection with a specific disposition application. In other words, HUD has concluded that, whether the disposition is in Los Angeles or Boston, involves 50 units of public housing or 500, and irrespective of the magnitude of the local funding shortfall or the scope of the repair needs, there are, in every case and in every location in the country, adequate "alternative resources" available to offset any shortfall in public housing funding. This defies both experience and logic within the public funding arena.

HUD's position also ignores the reality of what PHAs requesting disposition approval are trying to achieve. Generally, such requests are part of a redevelopment plan by which the original public housing units will be replaced by a mix of public housing units or project-based voucher units, along with Low-Income Housing Tax Credit units and perhaps market units in order to create an improved and sustainable community for low-income families. Thus, PHAs are attempting to carry out redevelopment plans that HUD has promoted through programs such as HOPE VI, Choice Neighborhoods, and mixed-finance public housing. In this way, PHAs are attempting to fulfill their affordable housing missions under their state enabling acts and under the 1937 Act. Yet, the Notice is frustrating those goals, and the Proposed Rule threatens to perpetuate the problem.

3) Imposition of Obsolescence Criteria and Standards for Demolition Applications on Disposition Application

The Notice also imposes, in Section 10(B), an additional "overlay" of both HUD's demolition regulations and the narrow demolition standards of Section 14 of the Notice on dispositions "supported by obsolescence criteria." Although the statute and HUD's regulations both segregate the conditions of approval and reasons for denial for dispositions and demolitions, the Notice "merges" the requirements in the case of a disposition involving the elements of obsolescence. This, in turn, invokes the very narrow and restrictive requirements of Section 14 of the Notice (discussed in Section D, below) in these cases, turning a disposition application into one that must satisfy two, separate statutory and regulatory tests plus the dual tests of the Notice. The Proposed Rule continues this "merger" policy, although with some variations as discussed in the following sections. Again, to understand this interplay in the Proposed Rule, one must understand HUD's current policies embodied in the Notice.

While HUD presents the obsolescence criterion as an additional avenue for PHAs to pursue disposition, it effectively becomes a requirement for disposition approval because the Notice shuts off other possible justifications that may be permitted by the broad language of the statute. Although it is not stated in the Notice, HUD has also adopted an *ad hoc* policy requirement of one-for-one public housing replacement on SAC approvals of disposition requests as a condition for meeting the obsolescence test. This requirement is not contained in the statute or in HUD's published regulations.

Prior to 1996, Section 18[4] did require one-for-one replacement of public housing units for any demolition or disposition for which approval was requested from HUD. The one-for-one replacement requirement was eliminated in 1995 with the passage of the FY1996 HUD appropriations act, and permanently repealed 1998 when Congress passed QHWRA. Despite these clear expressions of Congressional intent to abolish the requirement, HUD has revived the one-for-one replacement requirement, currently as an informal, unpublished policy and, as evidenced by the Proposed Rule, in regulatory form.

Further, HUD's current policy position on one-for-one replacement is even narrower than the earlier version of Section 18, since the latter permitted a PHA to fulfill its replacement requirements by providing forms of assistance other than public housing to families rather than having to provide hard units. QHWRA also shifted the focus of the demo/dispo evaluation to the certification from the PHA and away from HUD's determination in the first instance. The one-for-one requirement of the Notice, which it appears may be continued as HUD policy in the Proposed Rule as described below, is inconsistent with the underlying legislation, and is not supported in the Notice or in the Proposed Rule with any statement or citation of HUD's authority to merge these statutory provisions in his policies and regulations.

The current iteration of Section 18 contains several sections or subsections that apply to **both** demolition and disposition applications and others that apply to only one or the other. For example, the

[4] 42 U.S.C. § 1437p(b)(3) (1992)

beginning of Section (a) of Section 18 applies to both demolitions and dispositions and, as we discussed in Section A above, states that HUD "shall" approve applications for either demolition or disposition if the PHA submits the proper certifications, subject to disapproval criteria set out in Section (b), which section also applies to both. Both of these sections are generic, that is, they do not address any particular aspect of application or disapproval that would apply only to a demolition or disposition application. However, Subsections (1) and (2) of Section (a) each apply only to demolition ((a)(1)) or disposition ((a)(2)) and contain specific requirements for each.

The statutory standards for approval of a **disposition**, as set out in Section 18(a)(2) , focus on a range of reasons for disposition that support a determination by the PHA that the proposed disposition would be "in the best interest of" either the residents or the PHA. These include considerations of how the areas surrounding a project affect the health and safety of the residents or the feasibility of operation of the project, and how a disposition would allow the agency to replace the project with property that would be more "efficient" or "effective" for its mission. The section also includes much broader language that would allow a disposition if in the best interest of the residents and the PHA, and that is consistent with the goals of the PHA, its plans, and the 1937 Act. The section also authorizes approval of disposition in the case of property that is excess to the needs of the PHA, or incidental to its operation. In short, these standards are broad, are cast within the discretion of the PHA and its judgment, and, most significantly, say nothing about a requirement of obsolescence or an interplay or overlap of sections (a)(1) and (a)(2). HUD's regulations track this standard, yet the Notice and Section 970.17 of the Proposed Rule insist on the "merger."

Section (a)(2), on the other hand, which applies to **demolition** requests, contains a specific requirement that any demolition must be supported by a certification of the PHA that the project is "obsolete" as to physical condition, location, or other factors and, as a result, is "unsuitable for housing purposes." While the method of application is the same—a certification from the PHA that these factors exist—the required showing for demolition is much more specific than for a disposition and cannot rest solely on a judgment of the PHA that it would be in its or its residents' best interests to demolish the property. Again, 24 CFR 970.15 and Section 970.15 of the Proposed Rule track the statute.

One could conclude from reading these two sections that **any** certification that supported a demolition could also, by definition, support a disposition as well under its broader terms of "not in the best interest." The inverse, however, does not follow since the demolition section does not grant broad, judgmental discretion to the PHA to determine what is in its or its residents' "best interest." Thus, it appears from the very different language and standards adopted by Congress in these sections that it intended a clear separation of the standards in application. And, although the "disapproval" standards in subsection (b) are applicable to both dispositions and demolitions, those standards are functionally generic in the demo/dispo situation and do not contain any specific provisions that apply more to one or the other, except in respect to a disposition. In that case, the language contains certain requirements regarding possible purchase of the property by residents or a resident organization.

Since Congress used very specific, and different, language to describe the criteria and standards for

approval of a demolition, as opposed to a disposition, and imposed an obviously higher standard and required showing for demolitions, HUD's "overlay" or "merger" of the statutory demolition standards to disposition requests that happen to involve obsolescence appears to be a significant "rewrite" of the legislation by HUD, and imposition of unauthorized legislative conditions on disposition requests. This policy started in the Notice would be continued in the Proposed Rule, where it will be just as offensive to Section 18.

Federal courts have held that they will look only to contemporaneous rationale provided by an executive agency at the time of implementation of a regulation to determine if the agency has properly explained the basis and purpose of the rule. They have also held that the agency must "adequately discuss" the relationship between its interpretation and the goals of the statute.[5] HUD did not offer any such "discussion" when it adopted the Notice, nor any agency explanation, findings, expertise, or other basis to explain the connection between the Notice and the goals of the underlying statutory provisions. Without any such explanation, the "merger" or "overlay" of the demolition standards to disposition requests appears is simply unsupported by the legislation, particularly in light of the agency's adoption of the Notice without notice and comment rulemaking under the APA.

4) Rigid and Unreasonable Obsolescence Standard

Section 14 of the Notice, "Demolition Review Criteria for Cost Ineffectiveness," imposes a narrow and restrictive standard on determinations of obsolescence, limiting a PHA's "modification" budget to very narrow categories over short periods of time to determine if there is a "reasonable" and "cost effective" means of "returning" the project to "useful life." Section 14 limits consideration of work and costs solely to those necessary for "immediate needs (up to three years)", work that will restore the project only to "average" quality, costs only for "necessary repair" (not including anything new except air conditioners and items required for code compliance), and work limited to the inside of dwellings or within five feet of the exterior wall. Site improvements, parking lots, security cameras, playgrounds, and community centers are specifically prohibited from consideration in the rehabilitation calculus. The provisions of Section 14 have the effect of essentially prohibiting demolition of otherwise hopelessly obsolete projects that are unsuitable for occupancy and which cannot be made suitable by current standards within these restrictive guidelines.

These requirements greatly exceed those of the statute. The demolition standard adopted by Congress requires (among other things) a certification of the PHA proposing demolition that:

> (i) the project (or portion) is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes; and (ii) no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life[.]

The Notice sets out an obsolescence standard for modification costs that focuses only on the most

[5] *Id*.

minimal and basic repairs, and weighs the cost of these against replacement of the entire project for determining whether to approve a demolition.

The Proposed Rule changes this standard for approval of a demolition application by inserting both a new standard and required methodology for demonstrating obsolescence as to the physical condition of the project. Proposed Section 970.15 (a)(1) requires the PHA to submit evidence from an independent architect or engineer that structural deficiencies, outstanding capital needs or other design or site problems exist such that "no reasonable program of modification is cost-effective" to return the project to its useful life. The standard for cost-effectiveness is that, if the cost of the "program" of modifications exceeds "Housing Construction Cost" as defined in 24 CFR Part 905 in effect at the time the application is submitted to HUD, the property will be deemed obsolete.

While this new standard appears to replace the "patch-it-up" formula set out in Section 14 of the Notice, it results in a counterpart requirement that HUD will require rehabilitation through "modifications" in *lieu* of demolition, even if those "modifications" cost nearly or exactly the same as would demolition and new construction. While this outcome may make sense in some situations, an absolute rule containing this standard is not reasonable given the huge disparity between the end-products (modernization versus new construction) in terms of design, materials, efficiency, environmental impact, etc.

In addition, the Proposed Rule would also impose a requirement that a PHA must support its finding and declaration of obsolescence under this standard with cost estimates and analysis prepared by at least one "independent" architect or engineer, defined as one not in the employ of the PHA. This adds a significant cost and time burden on every application for demolition, and categorically rejects the judgment and expertise of a PHA without any apparent findings or rationale for doing so.

5) <u>No Rulemaking</u>

Finally, as noted above, HUD adopted the Notice without complying with APA rulemaking requirements. The central rulemaking question under the APA and governing case law is whether a challenged agency rule is "interpretive" or "legislative." If the rule is merely interpretive, notice and comment rulemaking is not required. If it is legislative, rulemaking procedures must be followed by the agency. Sections 10 and 14 of the Notice contain legislative rules. Those sections are not merely statements of HUD's interpretation of Section 18, nor are they just a restatement of standards in the Existing Rule. Rather, both Sections produce "significant effects on private parties" and "new methods for determining the obligations of the regulated parties," the hallmark of a legislative rule according to the courts. Since both the procedure **and** the standards for obtaining an approval of the statutory authority for Demolition or Disposition granted in Section 18 are significantly affected by the Notice, HUD adopted legislative rules when i issued the Notice.

The same can also be said since the Notice eliminates the opportunity for an individual, case-by-case determination on a disposition application, by legislatively proclaiming that HUD's "data and

information" concerning "alternative resources" has conclusively, precluded the possibility of certifying that sufficient public funds do not exist to carry on with the property and that no adequate or sufficient "alternative resource" exists, by imposing a one-for-one public housing replacement requirement on disposition requests, by applying statutory and regulatory demolition standards to disposition requests and by adopting a substantive standards and definitions of the various statutory terms used in the demolition section of Title 18. Together and individually these are agency actions that establish new methods for determining the obligations of PHAs in connection with demolition and disposition applications.

As noted above, and as will be discussed in greater detail in the sections that follow, the Proposed Rule fails to correct and could make the problems of the Notice worse. To the extent HUD continues to apply and enforce the unlawful policies of the Notice, rulemaking now will not cure the absence of proper rulemaking three years ago, nor will it correct the substantive impropriety of the Notice provisions that are continued in the language or policies of the Proposed Rule. We believe that HUD needs to address in the Proposed Rule what its intentions are with respect to the Notice and the policies in it.

4. <u>Specific Criteria for Approval of Disposition Applications (970.17 and 970.19)</u>

a. Disposition in the Best Interests of PHA and Residents

Perhaps the most critical issue in the Proposed Rule is the criteria under which a PHA may dispose of a public housing project and what becomes of the project thereafter, which is addressed in Sections 970.17 and 970.19. HUD and the public housing redevelopment community have been at odds over these policies for several years. As the statute states, and the Proposed Rule recites, HUD must approve a disposition application if a PHA provides certain certifications that are not clearly inconsistent with other information and data. However, in the Notice, HUD tightened its approval standards considerably and chose to apply to *disposition* applications the "obsolescence" criteria, which the statute and Existing Rule apply only to *demolition* applications. Also, in an unannounced and unpublished companion policy which only became apparent during HUD's review of an application, HUD also said that if a disposition application did not meet the obsolescence standard, then the PHA would be required to replace public housing units on a one-for-one basis.

PHAs strongly objected to these policies, arguing that not only was HUD prohibited from imposing such requirements without rulemaking, but that even with rulemaking, those requirements have no basis in the statute. Further, PHAs pointed out, in 1996 Congress expressly repealed the one-for-one public housing replacement requirement. Nevertheless, it appears that HUD has now included both the obsolescence standard for dispositions and a de facto one-for-one replacement requirement in the Proposed Rule without any discussion of the statutory basis for them.

Further, even in this Proposed Rule, HUD has not actually addressed the heart of the matter, which is the standard of review when a PHA certifies that disposition is in the best interests of the PHA and the residents. Instead, the Proposed Rule leaves broad discretion to HUD through a vague reference to "other reasons" as determined by HUD. Pursuant to Section 970.17(c) of the Proposed Rule, if a

disposition application does not meet the obsolescence standard for demolition under subsection (c)(1), and is not a mixed-finance rehabilitation project providing one-for-one public housing replacement under subsection (c)(2), then the only avenue for approval is subsection (c)(3), which states merely that HUD may approve the applications for "[o]ther reasons determined by HUD to meet the criteria of sec. 970.17(c)." Yet, that circular reference simply leads back to the obsolescence and one-for-one replacement requirements or to some other unarticulated standard and essentially preserves the status quo under the Notice, although in the regulations itself. We feel strongly that is not a sufficient outcome for the many applications which need to be approved but that do not comply with subsections (c)(1) or (c)(2).

The purpose of HUD's rulemaking through this Proposed Rule should be to bring this issue out in the open so that it can be debated and a reasonable outcome, consistent with the statute, can be achieved. Therefore, we call on HUD to withdraw and reissue at least this aspect of the Proposed Rule and open a dialogue with PHAs regarding it. Further, it leaves the door open for HUD to impose by notice or otherwise the policies described above in the discussion of Notice 2012.

In addition, we strongly object to the opening paragraph of Section 970.17(c) of the Proposed Rule, in which HUD asserts that if HUD finds that the PHA's disposition application meets the criteria for disposition under a different provision of federal law, such as voluntary or mandatory conversion under Sections 22 and 33 of the 1937 Act, respectively, then HUD may of its own accord simply re-characterize the application as an application under that other section. Congress has enacted various statutory provisions regarding public housing which may overlap, but they coexist and are available for a PHA to pursue them in accordance with their own terms. Congress has not granted to HUD authority to direct a PHA as to which provisions of law under which it may submit a discretionary application.

b. Additional Comments on Disposition Criteria (Section 970.17)

There are other problems with 970.17, as well. For example, Subsection 970.17(b)(1) implements the statutory provision which permits disposition to allow for the acquisition, development, or rehabilitation of other properties to be used as affordable housing. HUD has added substantial additional provisions to the Existing Rule that require the PHA to demonstrate "to the satisfaction of HUD" exactly what will be developed in place of the existing project. This includes a requirement that replacement units (in the form of hard public housing units or other affordable units) must be developed for at least 75 percent of the units disposed of. Further, (1) the replacement units cannot not be developed on the existing public housing site, (2) the PHA must have identified all of the replacement units or all of the land on which they will be built in advance, (3) the PHA must provide its financing plan for the replacement units to HUD for evaluation as part of disposition application review, and (4) the disposition itself must be an arms-length transaction at fair market value (FMV) with 100 percent of the proceeds going to development of the replacement units. Each of these requirements is problematic.

First, while it is reasonable to interpret the relevant section of the statute as requiring the acquisition, development, or rehabilitation of some off-site properties for low-income housing, it does not necessarily follow that the existing public housing site may not be used for any replacement housing,

either now or in the future. In fact, that provision directly conflicts with the authorization in Section 970.19(b) to develop affordable housing on a site disposed of for commensurate public benefits.

Second, it is not reasonable to require identification - together with supporting documents - of all replacement units or land at the early stage of the redevelopment process at which submission of a demo/dispo application takes place. That process is a fluid one and is dependent on many variables, including opportunistic acquisitions, requirement of financing partners, and local government approvals. In a typical example, it may be that a PHA and/or its development partner is able to identify a primary off-site redevelopment location which does not accommodate all of the replacement units, but is unable to find a new site for every replacement unit at this stage. It would be unlikely to have site control or financing to purchase the sites. The PHA might, of course have ideas and plans, but not necessarily site control, environmental approval , and site and neighborhoods standards approvals. No backup documentation should be required.

Third, it is not statutorily required or workable from a development perspective for HUD to require a development financing plan as part of a disposition application. Much of the required information will not be available at that point or will be subject to numerous contingencies and conditions, rendering it functionally meaningless in the long run. As you know, HUD already has processes to review and approve development of public housing (24 CFR Part 905, Subpart F) and project-based vouchers (24 CFR Part 983). Adding development related requirements to the disposition processes merely adds duplication and time to the disposition approval process – which already approaches a year in some cases. In addition, the HUD staff responsible for reviewing a disposition application do not currently have the required expertise to review the financing plan. If HUD were interested in moving to a system where a PHA first submits a development application (via existing processes) and then the disposition is approved as a matter of course upon development approval, then that is something the public industry would consider. However, we believe that the approach laid out in the Proposed Rule is not practical.

Fourth, while the question of FMV is a legitimate one, the requirement of an arms-length sale is not if, as we argue above, the site will be used for replacement affordable housing. Presumably, the arms-length requirement means that the PHA itself could not participate in the ownership entity for the on-site replacement units. We strongly disagree with that result, as PHA involvement in the development and ownership of the project provides public control and is a source of PHA revenue. Further, typically the value of the underlying land is needed as a development source for the affordable housing project and therefore cannot be paid out to the PHA at transfer.

Fifth, the requirement to “receive sufficient compensation from the disposition to replace not less than 75 percent of the public housing units” (Section 970.17(b)(2)) directly contradicts the permitted disposition for less than FMV (Section 970.19(b)). It is unlikely that a FMV disposition would produce sufficient funds to replace more than a small percentage of the existing public housing units. It is even less likely that a disposition for commensurate public benefits would produce sufficient funds. The statute requires disposition proceeds to be used for eligible uses under the 1937 Act; it does not require a particular replacement standard.

Finally, this 75 percent replacement standard creates a situation in which HUD wants to have both ways. A PHA seeking disposition under this standard intends to create new affordable housing on the public housing site, which, as described above, is consistent with the housing policies issued by HUD and Congress in recent years. As HUD is aware, these affordable transactions typically require multiple funding streams, including subsidies from the PHA and the local, state and Federal government in order to make the deal work and even then rarely generate cash flow. Despite these financial realities, in addition to the new low-income housing that is to be constructed on the transferred property, HUD would also require the PHA to construct replacement public housing; however, without a dedicated site or funding source. As described in the previous paragraph, the transferred property is being disposed of at less than FMV, generating disposition proceeds (if any) that would perhaps not even cover the site acquisition costs for the new off-site development, let along construction and other development costs.

c. Additional Requirements for Disposition Applications (970.19)

Section 970.19 contains numerous additional requirements for disposition applications, including a provision at 970.19(a) which, as in the Existing Rule, requires that dispositions must be made at FMV unless HUD finds that a "commensurate public benefit" will result. For the first time, however, HUD has defined that term. We refer you to Exhibit A, Item #1 for our comments on HUD's proposed definition.

Even where HUD does find a commensurate public benefit exists and permits a below-FMV disposition, Section 970.19(c) of the Proposed Rule would require a 30-year use restriction as a first priority lien requiring that the property be used for the purpose identified in the commensurate public benefit finding. We disagree with HUD's departure from its longstanding policy and practice of releasing its use restrictions once a disposition application is approved. We also question whether the 1937 Act permits such a HUD lien once the property is no longer used for public housing purposes and we are very concerned that through this new requirement, HUD will continue to exert essentially perpetual control over property even after it has supposedly been released from the restrictions authorized by statute. Without reconciliation of the two provisions, HUD would require a use restriction on housing built on the transferred site *and* a Declaration of Trust on any off-site developed public housing or project-based vouchers (required in 970.17(b)) for land disposed of "in the best interests of the residents" at less than FMV. Finally, under state law, PHAs are required to use their assets to carry out their public mission; HUD should continue to defer to the local process in determining the future use of such property and how any proceeds are used.

Section 970.19(d) of the Proposed Rule provides that if a PHA is unable to dispose of obsolete public housing units in their "as is" condition after diligent efforts to do so, then HUD may permit demolition of the project so that the PHA may then convey only the vacant land. We think this provision is not consistent with how a typical transaction works. In nearly all cases, the existing, obsolete public housing units have no market value, although the land does. Therefore, it is not realistic to expect a PHA to realize any disposition proceeds for the units in "as is" condition and the requirement that they try to do so simply amounts to an expensive and unnecessary procedural burden. In addition, the value of the land itself is typically required as a contribution the PHA makes in order to make the affordable housing deal financially feasible. Almost always, the existing public housing units must be demolished. If the PHA

has resources available to demolish the units first, before conveyance of the land to the developer, it can do so. Otherwise, the entire project – land and buildings – are conveyed to the developer and the demolition can be a project cost. That flexible treatment should continue, so this section should be deleted. See Exhibit A, Item #4 for additional discussion of this topic.

5. Specific Criteria for Approval of Demolition Applications (970.15)

In general, HUD's reorganization of Section 970.15 makes sense and is closer to the way the statute reads. Our concerns with respect to this section mostly have to do with the way it has been implemented in the past through HUD notices and SAC practices, since there is no indication in the Proposed Rule that will change. In particular, we call your attention to the interplay between: (1) the criteria for obsolescence in 970.15(a)(1), particularly as to physical condition (such as structural deficiencies, serious outstanding capital needs, and design or site problems) and as to "other factors" (conditions that have seriously affected the marketability, usefulness, or management of the project); and (2) the finding that no reasonable program of modifications is cost-effective to return the project to its useful life. In recent years, HUD has read these provisions together in a way which downplays obsolescence criteria such as original design flaws, high density, and changes in community norms for decent, marketable affordable housing, while also applying a very narrow, rigid "cost test" regarding the "reasonable program of modifications."

For example, there are still many public housing developments in the country which were developed in the 1940's, 1950's, or even later, which were not designed and built to contemporary standards for which have never had comprehensive rehabilitation. Those projects were built to standards in terms of density, unit size and configuration, building systems, and site design that would never be acceptable today. In many cases, in order to provide modern, decent affordable housing to low-income families today, only demolition and new construction will suffice. However, in applying the cost test to such projects, under HUD's notices and practices, HUD is essentially willing only to consider repair costs which will continue to make those units habitable, and not the substantial costs which must be incurred to bring those units into compliance with standards which HUD and affordable housing advocates have otherwise promoted in, for example, the HOPE VI and CNI programs, where the public housing units are indistinguishable from other affordable or market units in a development and neighborhood. We think HUD needs to broaden its interpretation of the cost test in the Proposed Rule. Otherwise, public housing projects which should be redeveloped will not be and PHAs will be forced to use scarce Capital Funds to make short-sighted repairs rather than invest in more sustainable housing for the long term.

Also with respect to the cost test in Section 970.15(a)(2), we do not disagree with HUD's decision to switch from using a percentage of TDC to using HCC (by which we assume HUD means "Housing Construction Cost" rather than the term which appears), since it might allow for a more comparable analysis. However, before finalizing that decision, we think HUD should share with PHAs its analysis, with representative examples from actual applications, of the impact of the proposed change. In addition, rather than setting the standard at full HCC to the dollar, we suggest HUD use a somewhat lesser standard, such as 90 percent of HCC. If the cost of new construction is only slightly higher than the

cost of major rehabilitation, then it makes more sense from an economic and public policy point of view to demolish and build new.

Under Section 970.15(c) of the Proposed Rule, unless a PHA also submits a disposition application with its demolition application, the PHA must certify that the vacant land comprising the project will be used for low-income housing purposes, as permitted by the ACC, which may include land banking. First, we do not understand why such a certification would be needed since, as a technical matter, if the PHA receives only demolition approval, it would still have to come back to HUD for disposition approval and the Declaration of Trust would still govern the property. Further, the PHA may not have determined yet what the best future use of the property is and should not be locked into a particular use at this time. We think HUD should leave it to the PHA to exercise its authority and discretion under state law to use the property in the way which in the best way to achieve its mission within existing parameters. Finally, if such a certification is required, then we do not believe that the reference to housing purposes "permitted by the ACC" is appropriate, since it would only permit the development of public housing. Any such certification should also permit the use of the property for Section 8, LIHTC, and other forms of affordable housing in addition to public housing.

Finally, we object to the provision in 970.15(a)(2) requiring that determinations of obsolescence be made by an independent third party rather than by PHA staff, as they are now. This is an unnecessary expense at a time when scarce public housing resources must be conserved. Further, PHA personnel are most familiar with their properties and will continue to provide reliable, accurate information to HUD about their capital needs, as they have in the past and as they do under HUD's regulations governing the Capital Fund Program planning and reporting process.

6. <u>General Requirements for Demolition, Disposition, and Retention Applications (970.7 and 970.45)</u>

HUD has added a requirement at 970.7(c)(3) and 970.45(c)(3) requiring a narrative explanation of the reason for any vacancies at the project. We are unclear how that information is relevant to a demo/dispo application. Vacancy rates are a key component of HUD's Public Housing Assessment System and will be addressed by HUD along with other occupancy and management issues prior to submission of any such application. Including this in the demo/dispo rule suggests that HUD may disapprove an application if it is not satisfied with the reasons for vacant units at the project. This section should be removed.

Sections 970.7(c)(4)(iii)-(iv) and 970.45(c)(4)-(7), respectively, require a PHA to explain the anticipated future use of the project after demolition, disposition, or retention including any anticipated subsidies (e.g., LIHTCs or PBVs) that the PHA expects will be used for future low-income housing on the site, and to describe plans for replacement of housing demolished or disposed of, if any. Similarly, Section 970.7(c)(13) requires, for dispositions at less than FMV, a level of detail regarding future low-income housing use which nearly amounts to a full development proposal, including identification of the legal documents to be used. We are concerned about this and similar requirements elsewhere in the Proposed Rule which bring issues regarding potential replacement housing into the review and approval

of demo/dispo applications. Section 18 does not contemplate such a review, instead focusing solely on issues pertaining to the viability of the existing project and we believe HUD must adhere to that. The continued use and operation of a PHA asset for public housing has to be evaluated on its own merits under the criteria established by the statute. As mentioned earlier, the PHA's ability to finance and develop replacement units is a separate matter which, if HUD subsidies are available and used, is the subject of one or more entirely different HUD review processes.

HUD should remember that it has been tacit HUD policy for many years to encourage or even require the removal of public housing projects from the inventory through Section 18, or Voluntary or Mandatory Conversion, and now RAD, and replacement of those public housing units with Section 8 assistance. During that time, PHAs have struggled to develop what replacement units they can with the limited resources available, but it has often been the case that providing a combination of vouchers and hard replacement units, whether ACC or PBVs, has been the best, most achievable outcome for both the PHA and residents. HUD scrutiny of replacement housing possibilities suggested by the Proposed Rule would be an abrupt departure from that long-standing policy. Further, it is likely to be counterproductive, since HUD review of preliminary replacement housing ideas at the demo/dispo stage will not provide any greater assurance that replacement housing can or will be built. Instead, it will simply slow down the redevelopment process and potentially have HUD lock in redevelopment choices that must be modified later when planning, financing, and other details are better known.

Sections 970.7(c)(19)(i) and 970.45(c)(15(I) of the Proposed Rule require, as part of an extensive new civil rights certification, that the PHA discuss "how it will make its best efforts to offer each displaced resident at least one unit of comparable housing that is located in a non-minority area with access to public transportation, employment, education, child care, medical services, shopping, and other amenities." Fair housing and equal opportunity are a critical aspect of PHAs' mission. Yet, the affordable housing opportunities which the Proposed Rule describes exist in far too few communities in our nation, whether in public housing, other HUD-assisted housing, or the private rental market. Imposing on PHAs who are trying to redevelop and improve public housing conditions with scarce resources the burden and expense of locating affordable housing which meets all of the above criteria for the relocation of every resident threatens to divert resources from and slow down the process of creating additional affordable housing units. The primary relocation resource that PHAs have under their control are other vacant public housing units or housing choice vouchers, which allow residents, with counseling, to identify housing with at least some of the characteristics HUD recites. The regulations should acknowledge that and provide a safe harbor for these relocation outcomes. Indeed, the regulation should use the long-used and widely-understood definition of "comparable housing" found in 24 CFR Part 24 rather than imposing different, and higher standards for comparable housing, particularly in the discussion of "a site not less desirable than the location of the displaced person's dwelling" than the Uniform Relocation Act does.

Section 970.7(c)(13)(iii), along with 970.21(d), would mandate for the first time a resident right to return to an existing public housing site undergoing redevelopment where a below-FMV disposition for commensurate public benefit is approved. HUD would likely argue that because its approval is required for a below-FMV transfer, it can attach conditions to that approval. However, the statute certainly does

not authorize a national right to return policy, and we believe HUD is exceeding its authority in mandating it – particularly as such on-site development would be in excess of the 75 percent replacement housing required by Section 970.17(b). In nearly all cases, a PHA needs to transfer the land to a developer entity below-FMV in order to make the redevelopment financing work. That financing also depends on density, building and unit configurations that may or may not match those of the existing project or the housing needs of families on the waiting list or in the community. Driving project planning and design, and therefore financing, through a right to return policy in the relocation plan places another substantial obstacle in the way of PHAs' ability to redevelop public housing properties.

Further, we must note the inconsistency between the last two provisions on which we have commented. On the one hand, HUD is directing PHAs to encourage residents to move away from their existing communities to communities with more favorable amenities. On the other hand, HUD is mandating that residents be permitted to return to the communities they are coming from. In this, and in other ways, PHAs have felt caught between competing HUD policy priorities. In fact, PHAs' experience has shown that the best way to provide housing of opportunity in mixed-income, deconcentrated settings is to demolish, dispose of, and recapitalize existing public housing sites in mixed-income settings with various forms of subsidy, while some original residents use vouchers to relocate to other neighborhoods of opportunity. Layering on additional requirements such as those above, ironically, interferes with PHAs' ability to do that.

Another example of this point is at Sections 970.7(c)(19)(ii) and 970.45(c)(15(ii) of the Proposed Rule, which provides that in addition to the civil rights certification, HUD may require additional information from the PHA showing that "the proposed demolition and/or disposition will not maintain or increase segregation on the basis of race, ethnicity, or disability and will not otherwise violate applicable nondiscrimination or equal opportunity requirements, including a description of any affirmative efforts to prevent discriminatory effects." What HUD fails to consider is that PHAs have been left alone to deal with decades-old decisions, in which HUD was involved, regarding the location and design of public housing developments. As HUD well knows, a principal reason for the demolition, disposition, and redevelopment of existing public housing projects in addition to simply improving living conditions, is to create mixed-income, deconcentrated social environments which provide a platform for opportunity for families who have been isolated from the economic mainstream. Further, it represents an important financial investment of public and private funds in historically-disadvantaged neighborhoods. It is axiomatic that redeveloping such properties in this way, which often requires going through the demo/dispo process, promotes civil rights goals. To ensure that, the civil rights certification already required by the existing regulation is sufficient.

Both Sections 970.7(d) and 970.45(c)(17)) set forth a troubling provision that to the extent a PHA as part of the approval process includes "documentation, certifications, assurances, or legal opinions in its application that go above and beyond the requirements of section 18 or this part, HUD may include these as additional requirements in its approval." The statute sets forth the criteria for demo/dispo approval and the purpose of the regulation is to implement the statute. If the PHA meets the statutory criteria, then its application must be approved. This provision sets up a dynamic where HUD may raise the bar and impose potentially escalating requirements what the statute requires, which we find

unacceptable. This is particularly problematic in the context of HUD's desire to review, as part of the demo/dispo process, preliminary future redevelopment plans, as discussed above.

7. Application of Dispo Regulations to Mixed-Finance Development

The Proposed Rule removes the broad exception from the disposition regulations afforded to mixed-finance development. Currently, the "[d]isposition of public housing property for development pursuant to the mixed-finance development method . . ." is not subject to the Existing Rule.

HUD added the current mixed-finance exemption to the Existing Rule as part of the 2006 revisions to the demo/dispo regulations,[6] writing that ". . . HUD agrees with the commenters that section 18 of the 1937 Act and this regulation do not apply to public housing property to be used for mixed-finance developments."[7] (emphasis added). HUD's response was prompted by concerns that imposing disposition requirements on mixed-finance development would duplicate an approval process that is already heavily-regulated, costly and time-consuming.

The Proposed Rule seeks to limit the regulatory exemption to only vacant land that is to be disposed of for mixed-finance development, thereby imposing dispo regulations on the transfer of existing public housing units. The Proposed Rule would also subject the transfer of vacant land to an unspecified HUD approval process to ensure compliance with Section 18. HUD has offered no rationale for this significant policy change.

We are concerned that this Proposed Rule would burden mixed-finance development sited for existing public housing projects with a burdensome and duplicative approval process without HUD even articulating why an additional layer of oversight is necessary. Also we are concerned that by HUD is creating an opening through which it could impose the dispo regulations on vacant land being transferred for mixed-finance development by requiring that the PHA submit "an application in the form prescribed by HUD" to demonstrate compliance with Section 18. It is unclear how the application required for vacant land in mixed-finance development would differ from the disposition requirements at 970.17 and 970.19, which would essentially make this exemption moot.

We urge HUD to retain the existing exemption provided to the transfer of public housing property (both vacant land and existing units) for mixed-finance development to avoid overwhelming these transactions with even more regulation and procedure.

8. Additional Procedural and Certification Requirements

The Proposed Rule adds various other requirements to the Existing Rule regarding PHA consultations, certifications, and submission of additional information. We believe that the Existing Rule has more than

[6] Demolition or Disposition of Public Housing Projects; Final Rule, 71 FR 62354-01.

[7] Id.

adequate requirements in this regard and strongly object to the notion that additional notices, meetings, consultations, certifications and submissions are what is needed to promote the recapitalization and preservation of public housing assets. More detail on these items is provided below:

a. **HUD Review of Activities Excepted from Regulation**. It is helpful that a number of new items are added to the list of activities excluded from the Proposed Rule; however, several impose unexplained HUD requirements for review and approval such as (1) cell towers, solar installations, and parking facilities, (2) ground leases of less than one year, (3) easements and right of way permitted in the ACC; (4) disposition of vacant land for mixed-finance development, (5) de minimis development, (6) corrections to legal descriptions, deeds etc. The Proposed Rule should **identify** what part of HUD does the review, and what the review standards are. Items 1, 2, 3, 5 and 6 do not currently require SAC approval. If SAC conducts these reviews, it must create an EXTREMELY streamlined approval method, approval will add a great administrative burden and slow down a PHA's ordinary activities – such as providing a simple utility easement over a corner of property covered by a DOT or a church to lease a vacant lot for parking for a year. Finally, the regulation does not address what HUD approval is required for Item 4. Based on a similar current exception, , HUD requires a PHA to comply wi2th the entire regulation, but permits it to certify to backup documentation. That is not exception and should not be instituted under the Proposed Rule. Section 970.3. Please define more clearly what "approved by HUD in writing" means in these contexts.

b. **Resident Consultation (970.9(a)).** Like many of the other requirements discussed in this section, the resident consultation process set forth in the Proposed Rule adds layers of documentation and certifications, but in this area, the bloated process also comes at the expense of offering residents a more meaningful role. For example, Section 18 requires that the PHA develop its application in consultation with the affected groups, which encourages a collaborative process. In contrast, the Proposed Rule would require consultation on the final application submitted to HUD, at which point the application is complete and such consultation would have little, if any, impact. This requirement would essentially exclude residents' opportunity to shape the application, unless the PHA elects to undertake a lengthy and burdensome two-step process, engaging residents first during the formulation of the application and then once the application is finalized. It is also unclear how the PHA would solicit comments on its final application since, under Section 970.7(a)(8) of the Proposed Rule, that application is supposed to include supporting evidence of the PHA's resident consultation. Finally, this section requires that the PHA communicate the required information with residents in a manner that is effective for persons with disabilities. We urge HUD to add a qualification to this requirement that such communications be provided "as appropriate" or "as needed" so that the PHA can tailor the materials to the specific needs of its resident community.

c. **Relocation Notices and Information (970.7(c)(7) and 970.21)**. The Proposed Rule also weighs down the relocation process with additional documentation, notices and certifications, in some cases requiring detailed information that does not inform this process in a meaningful way. For example, as described above, the proposed definition of "comparable housing" does not take into account a PHA's scare resources and the limited housing opportunities in a particular community that may meet this definition. Accordingly, PHAs will generally offer placements in existing public housing projects or projects with project-based Section 8 contracts. Therefore, it is unclear how submitting census tract information for these projects would enhance the review process. It is also unclear why HUD is requiring that the PHA include information about whether the comparable housing is located in a special flood hazard area, a requirement that is already imposed on most subsidized properties. Also if location outside of a special flood hazard area is a requirement of "comparable housing," it should be included in the regulatory definition of the term, not slipped into a notice provision. Similarly, the PHA would be required to certify that its actions are consistent with Federal civil rights laws, to which, as described below, the PHA is already required to certify under multiple sections of this same rule and other regulations.

d. **Civil Rights Requirements (970.7(c)(19))**. The civil rights certification described in this section is in many cases irrelevant and immaterial to a PHA's proposed demolition or disposition. While it may make sense for HUD to require that the PHA certify that the proposed demolition or disposition does not violate any civil rights order or agreement, it is unclear why the PHA's involvement in other civil rights cases or investigations unrelated to the proposed demolition or disposition would be relevant. In no event should a PHA's involvement in civil rights cases or investigations unrelated to the proposed demolition or disposition preclude it from receiving approval for a demolition or disposition application. The certification regarding a PHA's deconcentration efforts duplicates the certification required under Section 970.7(c)(1). Furthermore, HUD should postpone any rulemaking related to a PHA's obligation to "overcome discriminatory effects" until after the Supreme Court publishes its decision in *Inclusive Communities v. Texas Department of Housing and Community Affairs.* While the Fair Housing Act plainly requires PHAs undertake their activities in a manner that affirmatively furthers fair housing, this requirement is predicated on the notion that the Fair Housing Act implicitly prohibits discriminatory effects. The Court will answer this question and action to institutionalize the discriminatory effects standard should await the court's decision.

e. **PHA Plan (970.7(c)(1))**. While the first part of the proposed certification described in Section 970.7(c)(1) is consistent with language of Section 18, the second part of the proposed certification is unnecessary and duplicative. The PHA already certifies that it will carry out its PHA Plan, including any proposed demolition or disposition, in compliance with the Federal civil rights laws, including the obligation to affirmatively further fair housing, pursuant to 24 CFR 903.7(o). Furthermore, the certification required under 24 CFR 903.7(o) also covers

compliance with the PHA's deconcentration plan, as further described at 24 CFR 903.2(d)(3).

f. Supporting Information (970.7(c)(8)). The Proposed Rule also expands the amount of supporting information required for the application. For example, the Proposed Rule requires that the PHA prepare a summary of its consultation process, including the meeting dates and the issues raised. In addition to this summary, the Proposed Rule also requires that the PHA evidence that summary with meeting sign-in sheets and copies of written comments submitted. In essence, the Proposed Rule requires that PHAs submit supporting information for its supporting information. Similarly, as described above, the PHA should only be required to offer different forms of communications for persons with disabilities on an as-needed basis. It is excessive to then require that the PHA provide evidence that it provided such forms of communication, which is not a requirement otherwise imposed by 24 CFR 8.6, the source for this requirement.

g. **Aggregated Effect.** The overall effect of these additional requirements is a notable increase in both regulatory burden and cost of demolitions and dispositions, in a time of decreased funding. See 79 FR 62270 (Costs and Benefits).

1. Increased Administrative and Regulatory Burdens. HUD estimates the burden increase on HAs from this rule to increase by an additional *162 hours per application, per **PHA.***

2. Increased Cost**.** The Executive Summary notes states that the Proposed Rule may result in up to $2.23 million in additional compliance costs to agencies related to the need for consultants to complete the application, including, architects, engineers, lawyers and accountants. HUD's baseline for these costs estimated that the average cost for the additional hours is approximately $30 per hour (staff salary) on one page and $70 per hour on another. Although this may be a good estimate in regards to staff time, it does not take into account the cost to pay consultants to assist in the application process. It would be safe to assume that consultant hourly rates are *significantly* higher than $30 per hour and higher than $70 per hour; as a result, this estimation of additional compliance cost seems to be significantly lower than the likely actual costs.

3. Burden**.** Despite this, the Executive Summary opines that the Proposed Rule would "marginally add administrative burden" and would not have "any significant financial or cost incidence on stakeholders." This may count as not significant in the OMB regulatory approval process, but for PHAs in the current budgetary climate, four weeks of additional administrative costs related to demolition and/or disposition, as underfunded and under staffed agencies struggle to house families, could be the difference between preserving affordable units for low-income families and losing them forever.

4. Delays**.** Unless significant additional staffing is budgeted, HUD processing of demolition and disposition applications will slow dramatically – and they already take up to a year. We are also concerned that without hiring staff with development expertise, the many development related requirements about future use will be problematic for both PHAs and HUD.

9. Disposition Proceeds (970.20).

a. **Benefit PHA Residents (970.20(a)(4)).** The Proposed Rule makes some revisions to Section 970.19 regarding the use of disposition proceeds. However, HUD has not taken advantage of the opportunity to broaden its current interpretation so that it is more consistent with the statute, which provides simply that disposition proceeds may be used to "benefit residents of the PHA." In practice, HUD has interpreted this to be limited to "public housing" residents", an interpretation which is repeated in the preamble of the Proposed Rule. By contrast, HUD does permit the use of disposition proceeds for the development of Section 8 housing and even to supplement operation of the voucher program, but does not allow such proceeds to be used to benefit those residents through providing supportive services or in other ways. This is striking because the statute states that such proceeds may be used for "the provision of low-income housing or to benefit the residents of the public housing agency." Thus, while HUD acknowledges that "low-income housing" includes Section 8 housing, it somehow does not deem residents of Section 8 property who are assisted by the PHA to be "residents of the PHA." Based on the statute, we think HUD must broaden its interpretation.

b. **Significantly Increased Restrictions on Disposition Proceeds.** The Proposed Rule essentially superimposes Capital Fund requirements onto funds that, by regulation, are to be used for "low income housing":

i. PHAs must begin spending disposition proceeds within two years of disposition approval and fully expend proceeds within four years.

ii. Expenditure of disposition proceeds would take on the requirements of federal funds. Proceeds used to modernize or development public housing would be subject to all public housing requirements, such as environmental requirements, labor standards, and Section 3.

iii. Proceeds would be required to be kept in an account subject to HUD's General Depository Agreement and/or an escrow agreement.

c. **Expenditure and Recapture.** There is no rational basis for requiring disposition proceeds to be spent on essentially the same timeline as capital funds – disposition

proceeds are not appropriated and have no statutory expenditure deadlines. While PHAs should not hoard proceeds, they should have sufficient time to expend them as wisely as possible – which may mean the funds are not fully expended in four years. In this context, recapture is a draconian response.

10. **Retention of Projects under Part 85 (Part 970, Subpart B)**. While we welcome clarity on methods for removing federal restrictions from PHA-owned property without requiring a legal transfer of the property, this seems a procedurally awkward methodology on two levels, first it creates a parallel bureaucracy to the Subpart A demolition and disposition requirements, which it almost, but not completely, parallels, and second, it cites Part 85 rather than the authorizing legislation.

    a. **Combine with Part A for Single Application.** We propose the requirements applicable to retention applications be added to the demolition disposition section, with notations regarding the few demo/dispo requirements not applicable. This would achieve the purpose of the rule without duplicating bureaucracy. For example, the following subsections from 970.7(c) are repeated word for word in 970.44(c) unless indicated otherwise: Items 1 through 8, and 15-19 (Note: The Retention provisions are streamlined for Item 17). In fact, Section 970.45(c) is the only portion of the Retention Application that is not found in 970. The special requirements could be contained in a new 970.18 and the application requirements merged with 970.7.

    b. **Rely on Existing Legislative Authority.** Instead of citing Part 85 to authorize a PHA to retain a project after removing it from the public housing program, HUD should rely directly on the portion of Section 18 stating: "to demolish or dispose of a public housing project or a portion of a public housing project." Section 3 of the 1937 Act defines "project" as "housing developed, acquired, or assisted by a public housing agency under this Act… and the improvement of such housing." Because a project is defined as the HOUSING not the LAND, nothing in the 1937 Act requires a legal transfer to a third party; removal from the public housing program constitutes disposition of the Project (assisted) from the PHA.

    We are concerned that reliance on two authorizing sources for essentially the same actions may lead to divergence over time. For example, the Proposed Rule cites 24 CFR 85.31 and 85.3 as authority for the retention provisions. As you know, Part 85 will be eliminated soon after these comments are submitted, to be replaced by 2 CFR Part 200. Part 200 is a government-wide streamlining of grants management regulations and OMB circulars, and we have yet to see how it changes requirements at the agency and program level. Our fear is that reliance on this Part 200, which addresses every situation from research contracts, to housing, to entitlement benefits, could distort the "retention" process simply because of its vast scope.

c. **Permit Partial Retention**. The Proposed Rule contemplates disposition of a project, but not a portion of a project. I can see several instances where a PHA might rightly retain a portion of a project . For example, if a large project, or AMP, is to be redeveloped in phases as affordable, but not public, housing, a PHA might wish to defederalize in phases, perhaps as vouchers become available. Second, is where non-dwelling structures form a portion of a public housing project and the PHA wishes to sever from the "project" – such as a central office or a community building. We suggest adding "or portion thereof" after "project" throughout Part B, if it is retained.

11. Technical Comments.

a. **Closing Contracts (970.7(c)(5)).** We understand HUD's desire to review contracts of sale or ground leases; however, given the long-time frame involved in review and approval under the current lighter review, it is not feasible for a PHA to fully negotiate a contract, then have purchasers wait months for review and approval. Typically, the two activities go in parallel, or if the PHA intends to conduct a request for proposals type process, the legal documents would be developed after disposition approval. In addition, no standards are provided for such review.

b. Relocation Plans (970.7(c)(7) and 970.21). The new relocation requirements, particularly those identified in Section 8(c) above should be memorialized in model documents prior to issuance of the final rule, for PHAs to use as templates and adapt to their current circumstances.

c. Board Resolutions (970.7(c)(16)). HUD should drop the current requirement to have a board resolution authorizing the demolition /disposition application. PHA Boards are not micromanagers – their job to approve activities, not applications. Thus, a Board resolution authorizing a demolition, disposition or retention ACTION should also be accepted. Certainly, it makes no sense to require Boards to approve revisions to the application as suggested Exhibit A, Item #3. Also, note that the discussion of Board Resolutions submitted in the application discusses de minimis activities, which are excluded from the regulation.

d. **Government Consultation (970.7(c)(16)).** HUD has long required PHAs to submit a letter of support from the applicable jurisdiction. The new provision at Section 970.3(c)(16)(i) is a triumph of process over action – summaries of meetings, issues raised and responses. HUD's interest is that the jurisdiction supports the action, not the minutiae of discussions.

e. Current Residents (970.7(c)(20)). The Proposed Rule requires a description and data of the "race, color, religion, sex, marital status, national origin, familial status, and disability status" of potential displaced residents and the waiting list. These are

protected classes and PHAs have agreed not to discriminate against the protect classes. However, PHAs collect information on race, sex, age, and disability status, but do not collect the others. Thus, we are concerned that the Proposed Rule could require an overhaul of the software used to track residents and applicants, either by the big vendors, or by individual PHAs at disproportionate expense for a one-time action.

f. **Approval Documents** (**970.7(d)(2)).** This is simply too broad. It gives HUD has a right to ask for essentially unlimited documentation, much of which is unrelated to the disposition action, then incorporate it in to the closing documents. In addition to the other changes, we request that Section 970.7(d)(2) be revised to add a reasonableness provision related to "clarification" of the application rather than "support."

g. **Section 3 Assistance (970.14).** We think the text should read "disposition proceeds constitute covered assistance" or "if disposition proceeds are used for a covered activity" not "if disposition proceeds are used for covered assistance."

h. Partial Demolitions (970.15(b)). Subsection b states that applications for partial demolitions must "certify that the demolition will help ensure the viability of the project, except that this requirement shall not apply for applications where buildings are scattered non-contiguous sites." Many project numbers, or AMPs, other than scattered site housing multiple sites combined into one project for management purposes. Should this say "scattered sites or non-contiguous sites" for clarity, or is it intended to apply only to scattered sites? In addition, if a demolition is performed in the context of redevelopment of a portion of the site, it arguably helps insure viability of the remainder, but is different enough that it should be a separate justification.

i. Fair Market Value (970.19). Section 970.19(h) suggests that to estimate FMV "before the project is advertised for bid", the PHA needs an independent appraisal. Note that there is no requirement to advertise for bid, so the language should add "if applicable" after the quoted text. In addition, the section implies that that HUD reviews the appraisal methodology before the PHA advertises a project for bid. Logistically, does that mean a PHA that selects advertising for bid would get disposition approval prior to soliciting bids?

j. **Use of Disposition Proceeds.** Use of disposition proceeds is discussed more globally above at Section 8. In Section 970.20(a)(2), add "on the project" after "of CFFP debt" to clarify that the entire debt does not need to be retired. In Section 970.20(a)(2), add authorization for disposition proceeds to be expended on voucher recipients, who are also residents of the PHA, though they are not eligible for services under the Operating Fund.

k. **Uniform Relocation Act.** The term "URA" is used without defining the term or citing to law, regulation or handbook.

l. **Legal Opinions**. The Proposed Rule requests legal opinions three times. Opinions are expensive and the types of opinions requested will be heavily conditioned. This is not the most cost effective or best method of determining a PHA's compliance.

Exhibit A

Specific Questions for Public Comment

1. Question re: the proposed definition of "commensurate public benefit" in proposed § 970.5.

Comment: The examples in this definition are far narrower than the regulatory definition, which requires "commensurate public benefit" to residents of the PHA, the community, and/or the federal government. However, the examples are limited to rental units under a 30-year use restriction and subject to public housing requirements, homeownership units, nondwelling structures or facilities to serve low income families, and "other additional benefits as approved but HUD," particularly Section 3 activities. This definition and example activities are too narrowly focused on public housing activities. Certainly, some reasonable nexus is required between a PHA's residents and the public benefit, but the public benefit could, by definition, be directed generally toward the community or the federal government, which should include activities of the following sort as well:

- Transfer to a PHA-controlled owner for development of affordable housing, whether or not subsidized.
- Conveyance to a city or county for a park located near a project-based voucher, moderate rehab, or public housing project;
- Community and supportive services for voucher holders;
- Relocation planning and benefits;
- Land swaps;
- Conveyance to the federal government for a post office, which would serve the nearby PHA residents and other community members;
- Conveyance to a city or county, which would use the property for road widening and add signage and stoplights; and
- Transfer to a consortium of social service agencies that will serve PHA residents and other community members.

2. Question re: whether or not the definition of "disposition" in proposed § 970.5 should include a PHA's transfer to the PHA's own nonprofit instrumentality.

Comment: We agree that a PHA should not have to submit a disposition application when the PHA intends to dispose of the property to its instrumentality since the 1937 Act itself includes an instrumentality within the definition of "public housing agency." However, we are concerned by statements in the Proposed Rule that suggest that a PHA may not, *in any case*, actually dispose of public housing property to an instrumentality. For example, Section 970.7(c)(10) of the Proposed Rule requires the PHA to provide a legal opinion that the acquiring entity is a "separate legal entity (i.e., an affiliate or fully independent entity rather than an instrumentality of the PHA) under applicable state law." While HUD regulatorily treats an instrumentality as part of the PHA, under corporate law, they are separate entities having separate assets. A PHA should be able to transfer property to an instrumentality either

without approval, or with streamlined approval. Please clarify that an actual transfer of real estate to an instrumentality is acceptable, and under what conditions, if any.

In addition, the Proposed Rule arguably restricts PHA self-development (where a PHA instrumentality is the general partner or managing member of the owner). Typically, such owner entities have another member – an investor partner – which makes the owner not fully controlled by the PHA. However, use of single member LLCs (in which the only member is the managing member) is growing. In that case, a PHA would transfer a public housing property to an entity in which a PHA instrumentality is the only member. If transfers to instrumentalities are prohibited, conceivably so could transfers to single member LLCs. If these types of transactions are prohibited, then PHAs are essentially required to develop mixed-finance public housing for ownership by a private developer. This would be inconsistent with other aspects of the Proposed Rule, which goes to great lengths to keep public housing assets under HUD control. It is important for HUD to clarify this position.

Finally, the opinion required at Section 970.7(c)(10) requests a legal opinion on state law using a the HUD-developed distinction between instrumentalities and affiliates. Any entity organized under state law is a separate legal entity under state law. A PHA's ability to control such an entity may play into a lawsuit where someone seeks to pierce the corporate veil to reach past this entity to its alter ego. This makes the opinion required at 970.7(c)(10) inappropriate.

3. Question re: the requirements for a PHA to amend an existing approval under proposed §970.7(e). For example, should the PHA be required to get a board resolution approving the amendment request? Should the PHA be required to consult residents and local government officials on the amendment request? Should it depend on whether the change is minor or significant?

Comment: As discussed in the main response, the Proposed Rule essentially establishes second development approval process, but one that is approved so early as to be meaningless. Unless HUD sets a low threshold for review, PHAs will waste time (and money) and HUD will waste time (and money) preparing, reviewing, and approving multiple iterations as the development plan takes shape. Even in mixed-finance transactions, where disposition is closely tied to an already planned project, technical amendments and revisions are common. The Proposed Rule would escalate that. We propose, instead, that HUD require amendments only if: (1) the proposed use will no longer include public housing or project-based voucher housing; (2) the number of proposed HUD-subsidized units has been reduced by 20 percent or more; (3) if the transferee identified in the application changes; or (4) if the transfer becomes a sale at less than FMV requiring HUD approval of a commensurate public benefit. We see no need for requiring additional consultations or board resolutions unless the proposed use no longer includes public housing or project-based voucher housing. PHAs, of course, have the discretion to conduct consultations and request amendments more frequently if dictated by local practice.

4. Question re: the circumstances under which a PHA would want to only demolish structures on public housing property under proposed § 970.15 without also proceeding with a disposition of the vacant land after demolition (considering the land would remain under the conventional ACC and DOT and could only be used for public housing purposes, e.g., to construct new public housing units), and there is limited funding for such purposes.

Comment: A PHA's decision to demolish dwelling buildings and other structures on a property is distinct from its decision on future use of the underlying land, including whether to retain or sell it. For example, where a public housing property is obsolete due to the condition of the buildings or on a location unsuitable for new affordable housing, the PHA may have good reason to demolish the structures to reduce liability, prevent vandalism, and remove blight. This demolition may be necessary while the PHA develops a redevelopment plan for the property, for which the planning and financing process can take considerable time. It is in HUD's interest, as well as the PHA's, to demolish the obsolete buildings in the interim. In fact, HOPE VI was the solution to obsolete and vacant properties that PHAs could not otherwise demolish because of the prior one-for-one replacement requirement.

5. Question re: in those instances where PHAs seek to both demolish and dispose of public housing projects as part of the same request, when would it be appropriate for HUD to allow a PHA to demolish obsolete structures (with HUD funds) only to immediately seek to dispose of the underlying vacant land, and whether HUD should instead require the PHA to dispose of the obsolete structures in their "as-is" obsolete condition and have the acquiring entity agree to demolish or otherwise dispose of or use that property?

Comment: Most importantly, the traditional mixed-finance structure works because the PHA is able to demolish the units prior to closing on financing (and transferring property to an owner entity). These parties are financing new construction and expect a site ready for construction to start. Transferring obsolete buildings when lenders and investors are involved heightens their scrutiny of what should be an independent process – review of demolition draws, imposition of added guaranties, lien waivers, etc. These increase the time and cost of developing a public housing project without tangible benefit.

Also, for sales to third parties, imagine a public housing property that is largely vacant because it does not meet HUD property standards. The property becomes a liability, inviting vandalism, which can range from broken windows and graffiti to much more extensive damage, theft of copper pipes and wiring and fixtures, water damage, fire, squatters, and drug dealers. In such cases, a PHA is better off demolishing the units than using its limited resources to patrol, secure and maintain the property while the PHA plans a FMV sale or on-site redevelopment. Similarly, a property with public housing structures in place is likely worth less than the FMV of clean land less the cost of demolition for the same reason that homebuyers prefer a new kitchen to an old one they'd have to renovate themselves. The potential pool of purchasers with interest and skill to perform demolition is smaller than the potential pool of purchasers with the ability to purchase ready-to build property, especially to small purchasers like buyers of single family lots.

6. *Question re: the criteria HUD should use in determining if a project is obsolete as to location under § 970.15(a)(1)(ii) and whether HUD should require the PHA to simultaneously submit a disposition application in these instances;*

Comment: Please see our responses to Questions 5 and 6.

7. Question re: for HUD to approve disposition under proposed § 970.17(b) for acquisition of other properties that will more efficiently or effectively operate as low-income housing, this rulemaking proposes that the minimum replacement amount be 75 percent of the units (all units housing families displaced by the action must be replaced). HUD would also consider a minimum of 50 percent, and would be interested in public comment on this issue;

Comment: Please see the discussion in section 4.B of the comments.

8. Question re: are there any additional factors HUD should consider when approving a disposition for less than FMV under § 970.19(b)? Should the definition of commensurate public benefit under § 970.5 be amended?

Comment: We addressed our concerns with the definition of commensurate public benefit in item #1 above. We understand that HUD has a legitimate interest in making sure that promised public benefit does occur and preventing parties from "flipping" a disposed of property for profit. However, the requirement for a non-foreclosable use restriction goes too far. It is not based on, or even suggested by, the statute.

HUD should accept any use restriction imposed by funders of the replacement housing as sufficient, foreclosable or not, such as a low income tax credit land use restriction agreement (which has a minimum 30 year term but can be eliminated by foreclosure), HUD Declaration of Restrictive Covenants (long-term use restriction on public housing units) and HOME Funds Use restriction (which has a 20-year use requirement for new construction). Especially for mixed-finance, requiring another use restriction is duplicative. HUD should have one set of use restrictions coming out of the Office of Public Housing Investments, not two.

We are glad that the Proposed Rule does not require a reverter if the property ceases to be used for the approved purpose. Land ownership with such reverter is essentially unfinanceable; investors and lenders simply won't accept them. We hope that the current trend to require reverters via the disposition approval letters disappears and is not layered on top of the multiple new requirements found in the Proposed Rule.

9. Question re: in what extent of planning should a PHA engage under § 970.25 without receiving HUD approval under section 18? For instance, should a PHA issue RFQs or RFPs that assume HUD will approve a full or partial demolition and/or disposition of the project?

Comment: We find the current level of permitted actions to be sufficient as is. Looking to approve actions earlier in the process than already proposed would merely exacerbate the double development approval concerns discussed elsewhere.

As you know, planning for development involves juggling unknowns and constantly adapting to circumstances. For the example, it is unclear how HUD would approve a disposition (for which a PHA must produce evidence of a redevelopment plan) before a PHA has procured a developer and even less clear how a PHA could procure a developer and close within the proposed two years without having started the process prior to receiving disposition approval. More globally, this question demonstrates how the Proposed Rule's extensive requests for detailed information about future use is implicitly turning the disposition regulation into a duplicative, second development regulation.

10. Question re: in order to preserve and make most efficient use of appropriated funds, should HUD limit tenant protection vouchers (TPVs) to fewer than the number of occupied units being replaced in cases where the PHA can provide assistance from funds already allocated to it?

Comment: We are aware that the annual appropriation for TPVs is limited and in some fiscal years is not sufficient to cover all requests made in that year. However, we believe it is inappropriate to explicitly link demo/dispo approvals with TPV availability under the Proposed Rule. As we stated in the General Comments section, it appears that HUD demo/dispo policy in recent years, particularly in Notice PIH 2012-7, is being driven by budget considerations rather than the best plan for a property pursuant to the local planning and consultation process. As HUD is aware, and as we have referenced in these comments, chronic underfunding of public housing, especially in the Capital Fund, has led to the current capital needs backlog which approaches $30 billion. Thus, ironically, it is this federal under-investment in public housing assets that results in properties becoming obsolete and otherwise in need of demo/dispo approval so that a PHA can pursue redevelopment strategies with private and other funds or remove units from the inventory and replace them with other hard affordable units or vouchers or a combination of both. Whether it comes to PHAs in the form of Capital Funds, vouchers, or another form, PHAs need substantial increases in funding in order to preserve and/or replace public housing assets. We recognize the need to allocate scarce resources among competing needs and we are open to discussing with HUD how TPVs can be used strategically to ensure that replacement housing projects have sufficient cash flow to attract private financing. However, we do not believe that the Proposed Rule should introduce eligibility for TPVs as a factor in demo/dispo approvals.