February 25, 2018

SUBMITTED ELECTRONICALLY

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

Re: Docket No. FR-7006-N-15:
60-Day Notice of Proposed Information Collection: Comment Request:
Agency Information Collection Activities: Public Housing Annual Contributions Contract for Capital and Operating Grant Funds

To Whom It May Concern:

Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") is pleased to submit comments on the Department of Housing and Urban Development's ("HUD") notice of proposed information collection regarding the Public Housing Annual Contributions Contract for Capital and Operating Grant Funds (the "Notice").

Reno & Cavanaugh has represented hundreds of Public Housing Authorities ("PHAs") and their affiliates throughout the country and has been working with clients on fair housing issues throughout the years. Reno & Cavanaugh was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh's original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of our practice.

The mission of PHAs across the country is to serve low-income families in our communities by providing decent, safe, and affordable housing. PHAs have continued to work to foster a cooperative and successful working relationship with HUD to serve this mission. Historically, HUD provisions have encouraged flexibility for PHAs pursuing mixed finance developments. If HUD moves forward with issuing a revised ACC, there are a number of modifications needed to allow for PHAs to pursue HUD mixed finance developments with the flexibility they have typically been afforded. Therefore, to the extent HUD intends to incorporate mixed finance provisions directly into the proposed ACC, rather than through separate amendment (as is the current practice), we would encourage HUD to reach out to the industry for feedback before finalizing the proposed ACC and offer the following comments.

While Section 4 of the proposed ACC requires a Cooperating Agreement to be in effect, Cooperation Agreements do not apply to mixed finance projects that have made an election pursuant to Section 35(f) of the United States Housing Act of 1937, as amended.

Section 35(f) allows a PHA in a mixed-finance project to exempt the project's public housing units from the Cooperation Agreement requirement if the development of such units is not inconsistent with the jurisdiction's consolidated plan. Therefore, it is important that this Section 4 either include an acknowledgement that the Cooperation Agreement requirement does not apply to mixed finance projects that have made an election pursuant to Section 35(f) or otherwise provide a carve out for such projects that choose to make an election pursuant to Section 35(f).

Though Section 5.b of the proposed ACC requires a declaration be recorded against the Project "prior to the recordation of any other encumbrance," such requirement is inconsistent with HUD's practice, and we advise HUD to instead require such only "unless otherwise approved by HUD".

We would recommend that HUD add the following underlined language to Section 5.b, "…prior to the recordation of any other encumbrance unless otherwise approved by HUD." In many instances, HUD allows PHAs to record the HUD declaration after the creation of a leasehold interest or following the recording of an easement or other subdivision. In addition, we frequently work with many local counsels who take the position that they cannot opine on the enforceability of a use restriction recorded against an interest prior to that interest being created. Finally, in some deals, there may be existing encumbrances that will remain on the property but that are being subordinated to the HUD declaration. In such instances, HUD typically uses the terminology "unless otherwise approved by HUD" with regard to the recording order to allow the necessary flexibility to adapt to these types of situations.

Certain modifications must be made to Section 6 to conform to the realities of a mixed finance transaction.

Section 6.a: The general covenant against disposition and encumbrances does not acknowledge that mixed finance projects will need to enter into mortgages, use restrictions, and other encumbrances to finance the projects. Accordingly, we would recommend HUD clearly state that mixed finance projects will instead only be subject to the provisions contained in Section 6.b.

Section 6.b: Modifications are required in order to be consistent with the standard language in prior HUD mixed finance deals that has been vetted extensively with lenders and investors. Attached to these comments, you will find an edited markup of this Section. Below please find our explanations for each of the requested changes:

> Section 6.b.1 – The language in b.1 reflects that syndicators may have funds with upper tier investors, something HUD generally permits. The prior version of the Mixed Finance ACC Amendment permitted and acknowledged such a common structure; however, such language is notably absent from the proposed ACC. We recommend that

HUD re-insert such language to ensure that investors and syndicators will be satisfied that such funds are not prohibited by HUD.

Section 6.b.2 – This section assumes that an owner entity is either a corporation or a partnership. However, we often structure mixed finance transactions such that the owner entity is a limited liability company. Our edits here would ensure that limited liability companies are covered by and subject to the same requirements as corporations or partnerships when undergoing an internal reorganization.

Section 6.b.3 – Again, our changes to this section are to incorporate a limited liability company as a potential ownership structure for a mixed finance transaction. Similarly, language referring to a "General Partner" should also be amended to include "Managing Members" as the controlling interest in a limited liability company entity, which consists of members rather than partners.

Section 6.b.4 – Again, our changes to this section are to incorporate a limited liability company as a potential ownership structure for a mixed finance transaction. Accordingly, we recommend HUD also include and acknowledge that, in such a limited liability company structure, investors would constitute members of the owner entity rather than partners.

Section 6.b.5 – We have inserted a new section, Section 6.b.5, to allow for the general partner interest to be pledged to the construction or permanent lender as is often required by a private lender. Such provisions have previously been allowed and routinely approved by HUD in mixed finance deals as demonstrated in Section 9(E) of the Mixed Finance ACC Amendment.

Section 14.b, item (6), of the proposed ACC, must be revised such that projects electing to subject public housing units to real estate taxes will not cause a substantial default under the proposed ACC.

Section 14.b, item (6), of the proposed ACC states that "termination of tax exemption (either real or personal property) on behalf of a Project covered under the CACC" constitutes a substantial default. However, as explained above, Section 35(f) of the Act allows PHAs to subject public housing units to real estate taxes and/or to claim an exemption under state law. If a PHA chooses to make a 35(f) election and subject a Project to real estate taxes, as is permitted by the U.S. Housing Act of 1937, then the ACC needs to clarify that a PHAs decision to do so will not constitute a substantial default under the ACC.

Though Section 14.e of the ACC allows HUD to take title to the project in the event of a substantial default, HUD should refrain from doing so for a mixed finance project where the Owner Entity is remains in compliance with all of its project obligations.

We recommend HUD insert the following sentence to Section 14.e to ensure that HUD will not disturb a compliant mixed finance Owner Entity's rights, "Notwithstanding the foregoing, for

Mixed Finance projects, so long as the Owner Entity shall not be in default of its obligations related to such a project, HUD shall not exercise any rights under this sub-section 13.e in such a manner as to disturb the Owner Entity's and other participating parties' rights under any Project agreements." Such language has previously been used by HUD in Section 12(C) of the Mixed Finance ACC Amendment. Whenever there are public-private partnerships involved, as is often the case with mixed finance development, investors and lenders frequently look for and ask for such provisions to be included. Incorporating such a provision into the ACC now would prevent HUD from the need to deal with individual requests for such provisions on an ad hoc basis in the future.

Thank you for the opportunity to comment on the Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,

RENO & CAVANAUGH, PLLC

Enclosure/Attachment:

[Reno & Cavanaugh, PLLC Proposed Revisions to the 2018 ACC]

R&C Note: As referenced in the full comments submitted on behalf of Reno & Cavanaugh, PLLC, please find below a markup of Section 6 of the proposed ACC.

6. Disposition and Encumbrances.

a. *Covenant Against Disposition and Encumbrances.* The HA shall not demolish or dispose of any project, or portion thereof, other than in accordance with the terms of the CACC and applicable HUD Requirements. With the exception of entering into dwelling leases with eligible families for dwelling units in the Projects covered by the CACC, except as set forth in a Mixed-Finance declaration, mortgages identified in a Mixed-Finance amendment, and normal uses associated with the operation of the Project(s), the HA shall not in any way encumber any project, or portion thereof, without the prior written approval of HUD. In addition, unless approved in advance and in writing by HUD, the HA shall not pledge as collateral for a loan the assets of any Project covered under the CACC.

b. *Mixed-Finance Projects.* No transfer, conveyance, or assignment shall be made without the prior written approval of HUD of: (i) any interest of a managing member, general partner, or controlling stockholder (any such interest being referred to as a "Controlling Interest") of the Owner Entity; or (ii) a Controlling Interest in any entity which has a Controlling Interest in the Owner Entity; or (iii) prior to the payment in full of all equity contributions described in the approved evidentiary documents, other than equity contributions made solely for the purpose of paying developer fees, any other interest in the Owner Entity, or in any partner or member thereof. The term "Controlling Interest" shall not include any interest, no matter how large, of a member or partner of Owner who is not a managing member or general partner of Owner.

1. Notwithstanding the foregoing, HUD consent is not required ~~where a business organization that has~~ for the transfer of a limited interest (non-controlling and non-managing) in the Owner Entity ~~transfers a non-controlling and non-managing interest in~~ or in any partner, member or stockholder of the business organization holding such limited interest, provided that the Owner Entity: (i) provides HUD with written notice of such transfer; and (ii) certifies to HUD that the new owner of the limited interest remains obligated to fund its equity contribution in accordance with the terms of the HUD-approved organizational documents of the Owner Entity.

2. HUD will not unreasonably withhold, delay, or condition a request by the Owner Entity for HUD's consent to an internal reorganization of the corporate~~-~~, company or partnership structure of the Owner Entity or any of the partners, members or stockholders of the Owner Entity.

3. Notwithstanding the foregoing, the prior approval of HUD and the HA will not be required for the exercise by any investor member or partner of the Owner Entity ("Investor") of its right pursuant to the ~~Amended and Restated Limited~~ Operating Agreement or Partnership Agreement of the Owner Entity (an Operating Agreement or Limited Partnership Agreement referred to herein as a "Partnership Agreement") to remove the managing member or general partner (a managing member of a limited liability company or the general partner of a limited partnership referred to herein as a "General Partner") of the Owner Entity and appoint the Investor or its Affiliate (i.e., any entity which directly or indirectly controls, or is controlled by, or is under common control with, the specified entity) as an interim ~~general partner~~ General Partner of the Owner Entity so long as the Investor gives prompt written notice to HUD of such removal and appointment ("Removal Notice"); provided that HUD and the HA consent will be required for the appointment of such interim ~~general partner~~ General Partner to extend beyond a ninety (90) day period and for the appointment of any entity (including the Investor of an ~~affiliate~~ Affiliate thereof) as the permanent replacement ~~general partner~~General Partner. Such 90-day period will commence on the date of the Removal Notice ("Interim Replacement

Period"). With the prior written approval of HUD and the HA, the Interim Replacement Period may be extended for an additional 90 days to allow the substitute ~~general partner~~ General Partner of the Owner Entity to find a replacement ~~general partner~~ General Partner acceptable to HUD and all other parties, provided that prior to the expiration of such additional 90-day period, the substitute ~~general partner~~ General Partner demonstrates that the Investor is continuing to fund (or has already funded) capital as required under the Partnership Agreement and that the Project continues to be operated in a manner consistent with HUD Requirements.

4. The consent of HUD and the HA will not be required for (i) any exercise by the Investor of its right to require the repurchase of its investor member or limited partnership interests as against the General Partner, any guarantor, and/or any affiliate thereof ("Repurchaser") pursuant to the Partnership Agreement, provided that the Investor provides prompt written notice to HUD and the HA at the time of its exercise of such right, and further provided that any resale of the investor member or limited partnership interests by the Repurchaser will be subject to the approval of HUD and the HA, such approval not to be unreasonably withheld, delayed or conditioned, or (ii) the exercise by the HA (or any approved Affiliate thereof) of its rights to acquire interests or the Property pursuant to the Right of First Refusal and Purchase Option Agreement of approximately even date herewith.

5. HUD and the HA authorize the Controlling Interest to collaterally assign and pledge its interest in the Owner Entity to a construction and/or permanent lender, and to allow a construction and/or permanent lender to exercise any of its rights pursuant thereto, so long as the construction and/or permanent lender gives prompt written notice to HUD of the exercise of such rights at the time of such exercise (the "Pledge Notice"). However, the consent of HUD and the HA shall be required for the appointment of any substitute Controlling Interest (including construction and/or permanent lender or its Affiliates) extending beyond a 90-day period. Such 90-day period will commence on the date of the Pledge Notice (the "Pledge Replacement Period"). With notice to the HA and notice and prior written approval of HUD, the Pledge Replacement Period may be extended for an additional 90 days to allow the substitute Controlling Interest of the Owner Entity to find a replacement Controlling Interest acceptable to HUD and the HA provided that prior to the expiration of such additional 90-day period, the substitute Controlling Interest demonstrates that the Investor is continuing to fund (or has already funded) its equity contribution as required by the Partnership Agreement and that Project continues to be operated in accordance with the Applicable Public Housing Requirements