



March 12, 2019

SUBMITTED ELECTRONICALLY TO rad2@hud.gov

RE: Comments on Draft Revision 4 to the RAD Notice (RAD for PRAC)

To Whom it May Concern:

CLPHA is pleased to present the following comments and observations regarding the Draft Revision 4 to the Rental Assistance Demonstration Notice (“RAD Notice 4” or “Notice”) regarding conversion of Section 202 project rental assistance contracts (PRAC), which we have prepared with our counsel, Reno & Cavanaugh, PLLC. We wish to thank the Multifamily Office of Recapitalization for its thoughtful and skillful balancing of the substantive issues and concerns presented by the different program areas, while maintaining an awareness of the components necessary to leverage external financing in order to rehabilitate this vitally needed housing stock. CLPHA is excited that numerous affordable housing practitioners have come to recognize RAD as the Department’s premier preservation tool, and that efforts are underway to see that it is emulated elsewhere.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (PHAs) own and manage nearly half of the nation’s public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

The vast majority of CLPHA members have participated in HUD’s RAD program, many from its inception. As a result, our members have an unrivaled depth of experience across all aspects of RAD having transitioned public housing developments and RAD II properties to both the PBRA and PBV platforms. Thus CLPHA is uniquely qualified to comment on the RAD Notice 4 and offers the following observations and suggestions.

General Feedback:

- The draft RAD Notice 4 is well organized. It is evident that a great deal of time, effort and care went into creating a clear, consistent and well organized Notice that synthesizes the RAD and PRAC statutory requirements while providing the flexibility necessary to leverage the external financing critically needed to revitalize and preserve the PRAC portfolio. The draft Notice is clear, well-organized and presented in a logical manner. The

clear instructions provided by HUD will help ensure the success of the RAD for PRAC program.

- The guidance in the draft Notice is clear. In general, the guidance provided in the draft Notice is clear, and to the extent there are any sections requiring clarification, we have submitted questions as noted below. Thank you for the opportunity to provide comments to help illuminate those areas requiring clarification.
- The proposed terms of the Elderly Use Agreement are for the most part reasonable and accurate, but CLPHA does have some concerns. Specifically, CLPHA questions the permanency of the term of the Use Agreement as currently drafted despite concerns about the adequacy of Federal appropriations, and provides comments to assist in aligning RAD for PRAC with similar use restricted properties. These concerns are outlined in detail later in this comment.
- There are some unique features of 202 PRACs that the Notice could account for better. For example, the majority of the PRAC portfolio are small projects (typically 20-35 units) and in many cases are owed by small non-profits, including religious groups, whose members either lack the ability or interest in continuing to manage and operate affordable housing. While the Notice provides mechanisms for such owners to leverage financing, it could do more to assist smaller non-profits lacking capacity to continue to own and manage such housing and who desire to exit the program. Without relief from some of the restrictions set forth in the Notice, HUD runs the risk of dis-incentivizing certain owners from participating in RAD for PRAC, and the properties will not realize the benefits of the program and would likely be lost as affordable assets once existing use restrictions expire. Our concerns are outlined in detail in the specific comments section below.
- There is significant interest in Project Based Voucher (PBV) conversions under the RAD for PRAC framework. While CLPHA and its members acknowledge and understand the Department's present limitations with respect to aligning its complex funding conversion mechanisms for properties transitioning from the PRAC to the PBV platform, we encourage HUD to continue to explore means of streamlining to adopt this capacity. PBVs are an important preservation tool because they enable project owners to realize financial security via long-term contracts with PHAs. CLPHA members have vast, proven experience working with the RAD program over a number of years with both PBVs and PBRA, and that experience would be invaluable to those PRAC owners looking to transition to either platform. PHAs can play a vital role in PRAC preservation by partnering with current non-profit owners that need additional capacity and support for conversions.

CLPHA supports HUD's intention to release the RAD Notice 4 as soon as possible to facilitate PRAC conversions, and accordingly concurs with the suggestion that the Department release the Notice with respect to PBRA conversions only at this time with the following two stipulations: (1) that HUD's valuable insights into the PBV conversion option shall be preserved in the PBRA notice as advisory information until a PBV notice

may be issued; and (2) HUD shall continue with all deliberate speed to undertake the work necessary to make PBV conversions for PRAC properties a vital option.

- HUD has provided adequate avenues for stakeholders to provide feedback on the direction of the RAD program. CLPHA appreciates the speed with which the Department is able to nimbly issue guidance with respect to the RAD for PRAC program via the notice method given that RAD is a demonstration program. HUD's approach shows transparency and increases the ability of program stakeholders to respond flexibly and quickly to changes in market conditions and financing as well as ownership changes and options. Stakeholders have adequate means of responding to and providing comments on the proposed guidance, and CLPHA and its members encourage the continuance of stakeholder involvement.

Specific Comments:

On behalf of its membership, CLPHA provides the following specific comments on certain individual Notice provisions:

4.3.1.A. Eligible Owners; Compliance with HUD Requirements, page 3, line 29. Please clarify what constitutes an adequate "history of compliance" with program and contractual obligations for purposes of being in good standing to participate in RAD for PRAC.

4.4.B General Requirements; CNA, page 5, lines 7-8. Typically the Department will accept CNAs completed within one year as acceptable to document project needs, thus we would appreciate clarification of why the Notice requires that CNAs for RAD for PRAC transitions may be no older than six (6) months. CLPHA is concerned that halving the time period of CNA applicability may drive up costs and without necessarily resulting in more accurate information about property conditions.

4.4.E. General Requirements; Replacement Reserve, page 6, lines 7-9. CLPHA would appreciate clarification regarding how HUD proposes to determine the sufficiency of replacement reserve levels.

4.4.F. General Requirements; Operating Reserve, page 6, lines 15-26. We note that the Operating Reserve is a new concept with no corresponding HUD model, thus CLPHA would appreciate additional guidance and clarification regarding this reserve and what purpose it is intended to serve as well as which rules will control use of its proceeds. Additionally, please explain the rationale for the \$250 per unit minimum balance. CLPHA suggests that HUD should develop authorized exceptions to the minimum balance for those situations warranting a reduction, such as natural disasters, or increases in tax or insurance expenses, for example. Furthermore, CLPHA questions whether HUD has the requisite legal authority and capacity to review PBV operating account information, thus the Operating Reserve concepts are likely inapplicable to the PBV context and require further consideration.

4.4.H. General Requirements; Ownership and Control, page 7, lines 7-27. CLPHA applauds the Department's recognition of various, diverse ownership structures that are intended to provide

necessary flexibility in the structuring and financing of RAD for PRAC conversions. Given its members' vast experience with RAD transactions, CLPHA expects that public agencies will likely provide significant value as they seek to partner with nonprofits on this initiative. CLPHA members look forward to working with non-profit organizations to revitalize and reposition the PRAC housing stock for the long-term.

4.4.H. General Requirements; Ownership and Control, page 7, lines 7-9. It appears that the requirement that the Covered Project be owned or controlled by a non-profit entity shall continue only through the original maturity date of the Converting Project's Capital Advance Note, while the Elderly Housing Use Agreement term will span an additional twenty (20) year period. Please confirm that the Department will support transitions to for-profit ownership or control (other than tax credit owners controlled by a non-profit) at the end of the maturity date of the original Capital Advance Note despite the existence of the Elderly Housing Use Agreement.

4.4.I. General Requirements; Elderly Housing Use Agreement, page 7, lines 36-38. We suggest that HUD consider adding additional reasons that the Department may terminate the Elderly Housing Use Agreement in case of abatement or termination of the HAP Contract aside from transfers of assistance only. For example, allowances should be made for force majeure, such as natural disasters or similar circumstances outside of project owners' control.

4.4.I. General Requirements; Elderly Housing Use Agreement, page 8, lines 1-15. As HUD is aware, serious and legitimate concerns exist about the availability and sufficiency of future Federal appropriations and the associated impacts on program participants including elevated costs of financing caused by such risks. While participants and lenders fear temporary disruptions in appropriations, even more troubling is the risk that certain HUD programs may be eliminated entirely in the future. Accordingly, it is unsustainable to require continuation of the Use Agreement restrictions regardless of the sufficiency of Federal funds. In the alternative, CLPHA suggests adoption of ameliorating language similar to that contained in existing use agreements. For example, the LIHPRHA use restrictions provide: "[i]f assistance under Section 8 or any successor program ceases to be available during the term of this agreement, this agreement will be renegotiated by the parties in accordance with [statutory provision]." Absent the ability to renegotiate contract terms in the event of a loss of appropriations, there is the very real risk that lenders will require large transition reserves to account for funding uncertainties that will likely make financing of the PRAC properties untenable, and such properties will not be preserved and will eventually be lost as affordable assets.

4.4.I. General Requirements; Elderly Housing Use Agreement, page 8, lines 1-15. CLPHA suggests that HUD implement tenant protection vouchers as a means of continuing to provide housing for those tenants impacted by the termination of HAP contracts. If the tenants are protected, the Elderly Housing Use Agreement may be released upon HAP Contract termination with no ill effects on the tenants.

4.4.I. General Requirements; Elderly Housing Use Agreement, page 8, lines 4-15. The specified income restrictions may pose compliance conflicts for partially assisted properties that participate in the LIHTC program and elect to income average their LIHTC units. Unless the authorizing state agency provides flexibility via floating unit designations, which we understand

is becoming less common, certain partially assisted PRAC properties' units may be unable to comply with the income restrictions specified in lines 4-15.

4.4.J. General Requirements; Restrictions on Proceeds from Sale or Refinance, page 8, lines 25-34. Per our general comments about the unique needs of smaller non-profit PRAC owners, who may or may not have the capacity to continue to provide affordable housing, CLPHA believes that HUD should moderate the requirement that all sales proceeds shall be restricted to benefit the property, its residents, or to advance other Affordable Housing Purposes. Without adequate relief regarding the use of sales proceeds, HUD runs the risk of dis-incentivizing a significant percentage of owners from participating in RAD for PRAC, who may instead opt to wait until the Capital Advance Use Agreement expires along with the affordable use restrictions, and such housing would be lost from the inventory. Please see the provisions of Notice H 2011-31 for examples of how the Department has reconciled these issues with respect to non-profits' sale of FHA-insured or formerly HUD-held multifamily properties. We believe that a similar approach would work well if integrated into the RAD for PRAC program.

4.4.J. General Requirements; Restrictions on Proceeds from Sale or Refinance, page 8, lines 34-38. Given the many years of insufficient funding of the PRAC portfolio, we anticipate that a number of project owners likely had no choice but to advance funds to maintain operations and protect the best interests of their residents. Accordingly, we urge the Department to view such Identity of Interest (IOI) loans with less skepticism and consider the positive impact such loans have made on project operations when determining repayments options. In this context, please clarify the criteria necessary to demonstrate to HUD's satisfaction that the reasonably anticipated needs of the project will be adequately funded despite repayment of the IOI loans.

4.4.J. General Requirements; Restrictions on Proceeds from Sale or Refinance, page 8, lines 25-38. Consistent with existing guidance governing prepayment and refinancing of Section 202 properties, we encourage HUD to permit the payment of developer fees to owners, sponsors or third-party developers. See Notice 2013-17 for examples of analogous provisions with respect to Section 202 direct loans.

4.4.J. General Requirements; Change in Unit Configuration, page 11, lines 29. With respect to the limit on the number of assisted units that may be reduced as part of the conversion (the greater of 5% or five (5) units), please provide additional clarification on the criteria the Department would accept in departing from these restrictions.

4.5.G. PBV Conversions; Initial Contract Rent Setting, page 16, lines 8-20. CLPHA appreciates the flexibility offered via the rent "bundling" option and expects this alternative to provide a valuable means of leveraging financing that would otherwise be out of reach for small or geographically isolated project owners. Please provide additional clarification with respect to "bundled" rents, and whether such bundling is restricted to only PRAC projects, or may similar subsidized projects (e.g., Section 202/8, regular Section 8) also be bundled together? Additionally, please clarify whether a number of projects under the same sponsor would be permitted to bundle rents. Finally, we assume that HUD will prorate and/or weight the rents to account for different unit sizes and mixes in the calculation of the bundled rents, but please confirm.

4.5.I. PBV Conversions; Distributions, page 16, lines 31-33. While CLPHA appreciates HUD's acknowledgement that Converting Projects shall be eligible for surplus cash distributions, the PBV program does not have requirements regarding surplus cash, residual receipts or distributions, and thus there are no mechanics for determining whether a project is in compliance. Accordingly, CLPHA questions whether HUD has the requisite legal authority and capacity to review PBV operating account information. At a minimum, the concept of surplus cash should be replaced with "cash flow" or alternatively HUD should define surplus cash without referencing terms not utilized or defined in the PBV program.

4.6.C. PBRA Conversions; Initial Contract Rent Setting, page 19, lines 8-19. CLPHA appreciates the flexibility offered via the rent "bundling" option and expects this alternative to provide a valuable means of leveraging financing that would otherwise be out of reach for small or geographically isolated project owners. Please provide additional clarification with respect to "bundled" rents, and whether such bundling is restricted to only PRAC projects, or may similar subsidized projects (e.g., Section 202/8, regular Section 8) also be bundled together? Additionally, please clarify whether a number of projects under the same sponsor would be permitted to bundle rents. Finally, we assume that HUD will prorate and/or weight the rents to account for different unit sizes and mixes in the calculation of the bundled rents, but please confirm.

4.6.D. PBRA Conversions; Method of Adjusting Contract Rents, page 19, lines 25-29. With respect to Maximum Rents, please confirm that a project owner may submit a request to increase Maximum Rents based upon an owner-provided Rent Comparison Study (RCS) (if market rents exceed Fair Market Rents (FMRs) by 120%) at any time after the first anniversary of the HAP Contract, but that such RCS and the associated Maximum Rents shall remain valid for a five (5) year period.

4.6.E. PBRA Conversions; Distributions, page 20, line 9. While CLPHA appreciates HUD's acknowledgement that Converting Projects shall be eligible for surplus cash distributions, the Operating Reserve is a new concept lacking a corresponding HUD model, thus CLPHA would appreciate additional guidance and clarification regarding this reserve. Specifically, please elaborate on the purpose of the Operating Reserve and which rules will apply. Additionally, please explain the rationale for the \$250 per unit minimum balance. CLPHA suggests that HUD should develop authorized exceptions to the minimum balance for those situation warranting a reduction, such as natural disasters, or increases in tax or insurance expenses, for example.

4.6.F. PBRA Conversions; No Rescreening of Tenants upon Conversion, page 20, line 13-28. With respect to "grandfathering" of current households in place prior to conversion, while we understand the inability to re-screen such tenants for eligibility following conversion, please clarify how such tenants shall be treated should there be a change in circumstances over time. For example, please explain whether a grandfathered household remains eligible for Section 8 assistance following a change in income, or if a member engages in criminal activity, or if a member's citizenship status changes.

4.7.3.A. Resident Notification and Consultation; Resident Notification, page 24, lines 25-26. Please elaborate on what shall constitute a material change in the conversion that would trigger an additional tenant meeting.

Conclusion

Thank you for the opportunity to comment on the draft RAD Notice 4, and for HUD's diligent and thoughtful efforts to produce a draft Notice that is responsive to the unique needs presented by the PRAC properties. CLPHA's members have a tremendous depth of experience with the RAD program and look forward to partnering with non-profit organizations to leverage this knowledge and preserve the PRAC portfolio. Should you have any additional questions, please do not hesitate to contact me at SZaterman@clpha.org. Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Sunia Zatterman". The signature is written in black ink and has a fluid, connected style.

Sunia Zatterman
Executive Director
CLPHA