

## Transactional Pitfalls and Challenges in Affordable Housing Development Outline

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Presentation will focus on the most active development programs, which generally combine HUD funds with Low Income Housing Tax Credits (“LIHTCs”) – public housing mixed finance, RAD, and Project Based Section 8.

### Predevelopment

- Environmental Review
  - Normal Due diligence
  - If Using Federal funds – Comply with 24 CFR Part 50 or 58
    - With Part 50, HUD conducts the review
    - With Part 58, a delegated entity conducts the review, often the City
    - Also see Notice PIH 2016-22 (HA) Environmental Review Requirements for Public Housing Agencies
      - Suggests getting environmental review before applying for tax credits
    - No choice limiting action, predevelopment costs are not considered choice limiting
    - Affordable housing pre-development costs including legal, consulting, developer and other costs related to obtaining site options, project financing, administrative costs and fees for loan commitments, zoning approvals, and other related activities which do not have a physical impact
- Zoning
- Disposition Application for Public Housing
  - Mixed Finance Development – Streamlined review process subject to Section 18 of the Housing Act of 1937, as amended. Development Requirements, 24 C.F.R. § 905 et seq., also see, Notice PIH 2016-20 (HA).

- Choice Neighborhoods Initiative – Development Requirements, 24 C.F.R. § 905 et seq., also see, Notice PIH 2016-20 (HA).
- Not Required for RAD
  - But see RAD notice re: disposition of excess property after RAD conversion. Notice PIH 2016-20 (HA).
  - In the case of portfolio-wide conversion, also see Notice PIH 2016-23(HA) on Requirements for PHAs removing all public housing units and guidance on either the termination of the ACC or the continuation of the public housing program.
- Acquisition Timing/Finance
- Showing Site Control for Tax Credit Applications
  - Options to Purchase 24 C.F.R. §58.22(d)
  - Ground Lease that Automatically Terminates in 365 days. Public Housing Program - Demolition or Disposition of Public Housing Projects, 24 C.F.R. §970.310.
- Ten Year Rule – There has to be at least 10 years between the date of acquisition by the owner and the last time the building was placed in service. Internal Revenue Code, 26 U.S.C. §42(d)(2)(B) (1986), as amended.
- LIHTC Basis
  - 10% Test
- **DISCUSS PRACTICAL EXAMPLE**
- Site and Neighborhood Standards Applicable to Federal Funds – 24 CFR §905.602 (public housing); 24 CFR §983.57 (project based vouchers); §92.202 (HOME program)
  - See materials for separate presentation on site and neighborhood standards
  - See also Notice on Statutorily Mandated Designation of Difficult Development Areas (DDAs) and Qualified Census Tracts (“QCT”) for 2017, *Federal Register*, Vol. 81, No. 200, Monday, October 17, 2016.

- IRC Section 42(d)(5)(B)(v) allows states to award an increase in basis up to 30 percent to buildings located outside of federally designated DDAs and QCTs if the increase is necessary to make the building financially feasible. This state discretion applies only to buildings allocated credits under the state housing credit ceiling and is not permitted for buildings receiving credits in connection with tax-exempt bonds. Rules for such designations shall be set forth in the LIHTC-allocating agencies' qualified allocation plans (QAPs).
- Significant title issues
- Relocation, If Needed
  - Section 18 Dispositions governed by 24 C.F.R. §970 (not the URA). 24 C.F.R. §970.11.
  - Uniform Relocation Act. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. § 4601 et seq.; HUD, Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition Handbook (2014); Uniform Relocation and Real Property Acquisition for Federal and Federally-Assisted Programs; Fixed Payment for Moving Expenses; Residential Moves, 80 F.R. 44182.
  - Additional Rules for RAD- Notice PIH 2014-17.
    - Documentation, Documentation, Documentation
    - Required resident meetings
      - At least two resident meetings required
        - If the conversion plan changes after resident meetings, must have another one explaining the change and allowing comment
      - RAD Information Notice (“RIN”) must be issued before meeting and describe

- General written information on the project and residents rights
  - Provide whether relocation anticipated or not
  - Provide residents with opportunity to comment
- Must maintain a “resident log”
  - Start with first resident meeting
  - Include every resident in the project in the log
  - Follow and document matters with the resident from resident meetings, to completion of the project, including re-occupancy
- No relocation until RCC issued- Notice PIH 2014-17, Section 7.
  - Early relocation may occur with written HUD approval provided PHA can demonstrate and document extraordinary circumstances.
  - Resident requested transfer to another public housing unit not considered relocation.
- **DISCUSS PRACTICAL EXAMPLE**
- Transfers of Assistance- PIH-2012-32 (HA), Rev-3, Section 1.4(A)(12).
  - Must have been included in a Significant Amendment
  - Requires a written approval from HUD based on the below information
  - Describe the proposed transfer of assistance including reasons for the proposal and the intended benefits of the transfer of assistance.
  - Describe how the transfer will affect the residents at the existing site.
    - Detail how the transfer will comply with the resident right to return.

- Describe how the transfer of assistance benefits the resident at the new site including schools, transportation, employment opportunity etc.
- When transferring assistance to an existing LIHTC property, the PHA must demonstrate that the transfer is necessary to help with the de-concentration of poverty and/or the de-densification of a public housing project with extensive capital needs.
- FHEO and Accessibility Worksheet
  - Will conversion impact current accessibility?
    - Describe how
    - Provide the number of accessible units post-conversion
    - Provide waiting list and occupancy data for accessible units
      - # of people on waiting list for mobility accessible units and vision/hearing accessible units
      - # of units currently occupied by residents requiring mobility accessible units and vision/hearing accessible units
      - Show the distribution of mobility accessible units and vision/hearing accessible units by bedroom size
  - Will the conversion require off-site relocation?
    - Describe plans for the relocation of current residents.
      - How many will need to relocate?

- Is the relocation is temporary or permanent?
- If temporary,
  - the expected duration of the relocation
  - the type and location (including census tract) of the replacement housing
  - how the housing qualifies as a comparable unit as defined by the URA and 49 CFR 24.2(a)(6)
  - the method of determining which families will be subject to temporary relocation in excess of twelve months.
- Detail the housing counseling and services to be provided to families
- Describe the likely housing market areas/communities where tenants will relocate through HCV assistance or other HUD assistance programs, including
  - whether they are relocated to an area of higher opportunity areas (e.g., areas with better schools, employment, transportation opportunities)
  - the extent of improved housing choices and opportunities under the relocation plan.
- Upfront Civil Rights Review
  - Upfront FHEO Review: New Construction

- Provide racial/ethnic characteristic of the census tract of current site
- Is the neighborhood an area of minority concentration based on the most recent census data?
- Is the neighborhood located in a racially mixed area that is neither minority concentrated nor a non-minority area.
  - Nonminority areas are those in which the minority population is less than 10%
- Upfront FHEO Review: Reduction or Change in Units
  - Describe the proposed change
  - Justify the changes, including data from the Consolidated Plan or Census that support the need for the proposed changes
  - Describe any alternative housing resources that are actually available to the group that will no longer be eligible to reside at the project (i.e., families with children or non-elderly disabled families) at a comparable rent to the designated public housing units and of a comparable size to those being designated
  - Indicate whether any families that currently reside at the project will not be able to return due to a change in occupancy.
    - If yes, provide the demographic characteristics of the residents that will not be able to return due to the change in occupancy type, the residents of the project, the residents of the PHA, the census tract of the site, and the PHA's jurisdiction.

- If no, provide the demographic characteristics of the group that will no longer be eligible (i.e., families with children or non-elderly disabled families), the census tract of the site, and the PHA's jurisdiction, and the demographic characteristics of the elderly population in the PHA's programs, the census tract of the site, and the PHA's jurisdiction.
- Upfront FHEO Review: Change in Occupancy
  - Describe whether the PHA still be in compliance with the minimum requirement that 5% of units be accessible to persons with mobility impairments and 2% be accessible to persons with hearing/vision impairments
  - Describe whether any families that need an accessible unit reside in any of the UFAS units being eliminated.
    - If yes, describe how the PHA will accommodate the family so that they can return to the project, if they choose.
      - A family requiring an accessible unit cannot be denied their right to return to the project due to the lack of an accessible unit.
    - Describe whether any families that currently reside at the project will not be able to return due to a reduction in units or change in bedroom distribution.
      - If yes, provide the demographic information (i.e., race, national



origin, disability, familial status)  
below:

- For reductions in units, provide the demographic characteristics of the residents of the units being eliminated, the residents of the project, the residents of the PHA, the census tract of the site, and the PHA's jurisdiction.
- For changes in bedroom distribution, provide the demographic characteristics of the residents that will not be able to return due to the change in bedroom distribution, the residents of the project, the residents of the PHA, the census tract of the site, and the PHA's jurisdiction.

- **DISCUSS PRACTICAL EXAMPLE**

- Right to Return

- Residents over Tax Credit Limits PIH 2016-17 (HA), Section 6.2.
- Residents with Special Needs PIH 2016-17 (HA), Section 6.2.

- Additional Rules for Developments Funded by HOME or CDBG

- Section 104(d) of the Housing and Community Development Act also known as "The Barney Frank Amendment" 104(d) is triggered by the use of HOME, CDBG, Section 108 Loan Guarantee, or UDAG funding in a project involving the demolition or conversion of low- or moderate-income housing. It should be noted that CDBG funding used solely for relocation assistance or project administration does not trigger Section 104(d) requirements.

- Replacement, on a one-for-one basis, of all occupied and vacant occupiable low- or moderate income dwelling units that are demolished or converted to a use other than low- or moderate

income housing in connection with an activity assisted under the HCD Act

- The period of time used to calculate a rental assistance payment:
  - Section 104(d) factors in 60 months vs. 42 months for the URA.
  - Section 104(d) eligible displaced persons may choose to receive relocation assistance under either Section 104(d) or the URA.
- Practically, applies in transfers of assistance, but not new construction or rehabilitation

- **DISCUSS PRACTICAL EXAMPLE**

- Business Arrangements between Partners
- Davis-Bacon/Prevailing Wages [24 C.F.R. § 905; PIH-2012-32 (HA), Rev-3, Section 1.4(A)(13); 42 U.S.C. § 12836]
  - Applies in RAD
- Financial Structure
  - 9% LIHTC
  - 4% LIHTC/Bonds
  - Either of the Above Plus HOME
  - Either of the Above Plus Public Housing Capital Funds/Replacement Housing Factor Funds
  - CNI
  - Project Based Vouchers
    - HOTMA Provisions for awarding PBV to developments in which PHA has an interest. Section 106 of Housing Opportunity through Modernization Act of 2016, as amended.

- Subsidy Layering- Administrative Guidelines; Subsidy Layering Reviews for Section 8 Project-Based Voucher Housing Assistance Payments Contracts and Mixed-Finance Development, 79 F.R. 57955.
- State Housing Loan Funds
- Thinking about Year 15
  - Right of First Refusal and Purchase Option
- Guarantees
  - HUD limits on guarantees for PHAs and instrumentalities
  - IRS limits on nonprofit guarantees

## Development

- Cost Overruns
- Compliance
  - 50% Test (Bonds)
  - Davis Bacon/Prevailing Wages
- Construction Warranties

## Post-Development

- If LIHTC, monitored by state housing finance agency, HUD (if HUD funds), and funders
- Placing units in service under LIHTC rules
  - When the first unit is available for occupancy
  - Qualifying tenants
  - Units meeting standard
- Lease Up
  - LIHTC Income Limits – 60% and below

- HOME Income Limits vary from state to state. “HOME Income Limits.” *hudexchange.info*. HUD Exchange, n.d. Web. 16 June 2017.
  - High HOME - The maximum HOME rents are the lesser of:
    - The fair market rent for existing housing for comparable units in the area as established by HUD under 24 CFR 888.111; or
    - A rent not exceeding 30 percent of the adjusted income of a family whose annual income equals 65 percent of the median income for the area, as determined by HUD, with adjustments for number of bedrooms in the unit. The HOME rent limits provided by HUD will include average occupancy per unit and adjusted income assumptions.
  - Low HOME - In rental projects with five or more HOME-assisted rental units, twenty (20) percent of the HOME-assisted units must be occupied by very low-income families and meet one of following rent requirements:
    - Rent not exceeding 30 percent of the annual income of a family whose income equals 50 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families. HUD provides the HOME rent limits which include average occupancy per unit and adjusted income assumptions.
    - The rent does not exceed 30 percent of the family's adjusted income. If the unit receives Federal or State project-based rental subsidy and the very low-income family pays as a contribution toward rent not more than 30 percent of the family's adjusted income, then the maximum rent (i.e., tenant contribution plus project-based rental subsidy) is the rent allowable under the Federal or State project-based rental subsidy program.
- RAD Right to Return
  - Alternate Housing Options
    - Tax Credit Adjusters
    - Filing the 8609 for Tax Credits

- Compliance with Funding Sources

If you have any questions or require additional information, please do not hesitate to contact Megan Glasheen at ([mglasheen@renocavanaugh.com](mailto:mglasheen@renocavanaugh.com) or (202) 349-2454) or Julie McGovern at ([jmcgovern@renocavanaugh.com](mailto:jmcgovern@renocavanaugh.com) or (202) 349-2472) or Dwayne Barrett ([dbarrett@renocavanaugh.com](mailto:dbarrett@renocavanaugh.com) or (615) 866-3224).