

SUBMITTED ELECTRONICALLY

September 26, 2022

Colette Pollard
Reports Management Officer, QDAM
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 4176
Washington, DC 20410

Re: Comments related to 60-Day Notice of Proposed Information Collection: Public/Private Partnerships for the Mixed-Finance Development of Public Housing Units, OMB Control No.: 2577-0275 (Docket No. FR-7061-N-09)

To Whom it May Concern:

The Council of Large Public Housing Authorities (“CLPHA”) and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments on the 60-Day Notice of Proposed Information Collection: Public/Private Partnerships for the Mixed-Finance Development of Public Housing Units.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm 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 everything we do.

On behalf of CLPHA and Reno & Cavanaugh, we thank you for the opportunity to comment on the proposed Mixed-Finance program documents. We appreciate HUD's efforts to streamline and standardize the Mixed-Finance documents and clarify when HUD intends to use the Mixed-Finance Development Proposal in situations that are not purely a mixed-finance construction closing, in particular. The Mixed-Finance program remains an important avenue for PHAs to create affordable housing, especially for PHAs seeking to utilize available units under their Faircloth limit. In addition, as HUD noted in its request for comments, the Mixed-Finance Development Proposal (the "Development Proposal") is a foundational document that HUD uses to review a variety of project requests. We are pleased with many of HUD's proposed edits that, in our view, improve the documents' usefulness, including updating citations, adding OMB numbers, improving formatting, and allowing PHAs to specify the type of project being described under the Development Proposal. We believe these changes will make the documents easier for PHAs and practitioners to use.

At HUD's request, we offer the below comments for HUD's consideration. Our comments identify areas in which we believe HUD can enhance the quality, utility, and clarity of the information to be collected. For convenience of HUD's review, we have included markups of discussed sections as exhibits to this letter. A marked-up Development Proposal is attached as Exhibit A to add context to these the discussions.

1. Standardize Transfer Restriction Language Across Mixed-Finance Documents

As HUD is aware, inconsistent provisions across documents creates unnecessary confusion, delay, and costs for PHAs, practitioners, and HUD reviewers. Creating uniformity across programmatic documents is a simple and straight-forward way for HUD improve the development process, while also making it easier for participants to follow HUD's guidance. As such, we urge HUD to make the transfer provisions in Section 9 of the Mixed-Finance ACC Amendment and Section 8 of the Declaration of Trust/Restrictive Covenants consistent. The Mixed Finance ACC Amendment includes provisions on the removal of controlling interests by equity investors and collateral assignments to bridge lenders that are not included in the Declaration of Trust/Restrictive Covenants. As demonstrated by the nationwide litigation on the transfer of low-income housing tax credit projects, maintaining clarity in transfer provisions is of paramount importance for protecting low-income housing. HUD should avoid creating any confusion by making the transfer provisions in these documents identical. Exhibit B identifies the inconsistencies noted in this section.

2. Automate Sections of the Mixed-Finance ACC Amendment and Development Proposal

While the specificity of the Mixed-Finance ACC Amendment is helpful in laying out the particulars of a project, it can also be unnecessarily burdensome. In particular, the Draw Down Ratio in Exhibit G requires a host of figures (often repeated) and several calculations that are particularly time-consuming. Given that financing amounts often change during the life of a transaction, updating and correcting these sections becomes arduous, particularly when trying to meet fast-approaching deadlines. These could be resolved with a simple addition to the Mixed-Finance Calculator. Requiring PHAs and practitioners to make the calculations and insert numbers repeatedly also creates significant room for human error. The same could be said for many sections of the Development Proposal, such as the calculation of developer fees in Section 9(a) and the contractor fees in Section 9(b), which require respondents to provide information that is already provided for in the Mixed-Finance Development Calculator.

HUD should ease the administrative burden and minimize the risk of error by automatically populating these sections through the Mixed-Finance Development Calculator. Participants would only have to enter the figures in one location and the spreadsheet would automatically perform the calculations and populate the sections with the needed information. This would not only save participants significant time and effort, but it would also reduce the time HUD reviewers spend remedying incorrect calculations and information.

3. Reinstate Previous Lower Volume of Submission Documents for Multifamily Design and Accessibility Requirements in the Development Proposal

HUD's proposed changes to the Development Proposal include significant alterations to Section 6: Compliance with Multifamily Design and Accessibility Requirements. While we find many of the clarifying changes helpful and illustrative (such as the kind of scales to use in plans), we are concerned by the significant expansion of submission materials required under the proposed changes.

We first question whether all of the new submission items are necessary for HUD to perform its review of accessibility requirements. The collective experience of Reno & Cavanaugh and the CLPHA members has been that the reviewing HUD architect only requires a project's half-size plans and specifications to ensure compliance. They also occasionally request elevations for context. If HUD has been able to sufficiently assess a project's accessibility compliance through just half-size plans and specifications for years, the purpose of the additional items—grading and landscape plans, furnishing materials, and interior elevations—is unclear. We urge HUD to not require materials which are not necessary for its review, as providing these materials will create additional cost and time for PHAs and their consultants.

Furthermore, given the technical nature of the construction documents, the plans and specifications should only be reviewed by a qualified architect. HUD field office (in their review of conventional development proposal) and programmatic staff do not have the training to provide an effective review of these submission items. Unless HUD intends to engage additional architects for review, the increase in submission materials will likely create delays and backlogs in HUD's review. HUD should therefore avoid requiring materials which are not necessary to ensure accessibility compliance.

4. Narrow Information Requested for Participating Parties in RAD Faircloth Development Proposal

Section 4 of the Faircloth to RAD Mixed-Finance Development Proposal (the "RAD Faircloth Proposal") seems to have been inserted for the purpose of identifying how a project will meet the RAD Ownership and Control Requirements. However the proposed inserts both expand the information that applicants must provide on participating parties in a typical mixed-finance proposal AND fails to ask the questions that would identify Ownership and Control. In addition, **any provision of 2530 documentation – which includes Personally Identifying Information such as social security numbers – should be separate from the RAD Faircloth Proposal** to avoid the wide circulation such proposals typically receive.

A more direct approach to RAD Ownership and Control Requirements would request the following:

- Organizational chart of Owner, in the format required by Notice H 2016-15.
- The submission must disclose any identity of interest between any of the parties.
- If the PHA is not controlling the Owner, identify how the Project will meet the Ownership and Control Requirements

If the purpose of the final parts of Section 4, is also to identify 2530 clearance for PBRA transactions as required by RAD, the requirement is premature—any documentation obtained before construction start would be stale long before conversion to permanent financing. In addition, the proposed language should be revised to reference the technical terms "Controlling Participants" and "Specified Capacities," consistent with HUD's requirements in the 2530 context. The use of the term "participants" adjacent to the expanded mixed-finance chart identifying "participating parties" could lead to misunderstandings regarding the scope of parties to be identified under Notice H 2016-15.

5. Tailor Development Proposal Submission Requirements to Project Type

We support HUD’s attempt to clarify the submission requirements for the different kinds of projects reviewed through the Development Proposal (except as noted in Section 6 below). The separate RAD Faircloth Proposal helpfully identifies information specific to such kinds of projects. However, HUD should do the same for the other kinds of projects listed in Section 1 of the Development Proposal. HUD should specify throughout the Development Proposals which sections are applicable or inapplicable to specific projects. Many sections, for example, are not applicable to refinancings. HUD has posted alternative guidance for some of these, but that guidance is not referenced. Because it does not note that non-mixed-finance transactions do not need to fill out every category, over time the default will become submission of the full document—even irrelevant sections. Clearly identifying the submission requirements for project types will help PHAs, practitioners, and HUD reviewers avoid needless confusion and delay.

6. Exclude all References to Local Non-Traditional Housing.

The Moving to Work Collaborative is submitting comments regarding removal of the references to “local non-traditional housing” from the Development Proposal. CLPHA endorses and reiterates those comments. Requiring project-by-project review—or even suggesting it in an OMB approved document—is antithetical to the fundamentals of the MTW program.

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

Sincerely,



Sunia Zatterman
Executive Director
CLPHA



Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC

Enclosures: Exhibits Containing Markup of Proposed Documents

Exhibit A

Excerpts from Annotated Development Proposal

The public reporting burden for this collection of information is estimated to average 16 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions to reduce this burden, to the Reports Management Officer, Paperwork Reduction Project, Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

This collection of information is required for developing a Mixed-Finance rental project pursuant to HUD regulations 24 CFR 905. The information will be used to provide HUD with sufficient information to enable a determination that the proposed housing project is demographically and financially feasible and that HUD statutory and regulatory requirements have been met. No assurances of confidentiality are provided for this information collection.

Public Housing Authorities (PHAs) must obtain HUD’s approval before developing new public housing or undertaking the major modernization of an existing public housing development. Under 24 CFR 905.606, PHAs must submit this Development Proposal to HUD for all types of housing development that will utilize public housing funds, including capital or operating funds, so that HUD can assess the viability and financial feasibility of a proposed development and assure its compliance with public housing regulations. This Development Proposal must also be submitted for development of any public housing or non-public housing units funded through a Choice Neighborhoods grant. If a PHA does not submit a Development Proposal and secure HUD approval, the PHA may have to repay any public housing funds used in conjunction with the project.

The purpose of this document is to provide a template for the Development Proposal’s preparation. Information may be typed directly into this form. This template **may**¹ be used for all types of public housing development. However, it is required to be used for mixed-finance public housing development and for development funded through a Choice Neighborhoods grant. This document may also be used for projects including development of **non-public housing units**² through initiatives such as Moving to Work (MTW), the refinancing of existing projects, and Section 30.

This document, along with its attachments, generally includes all information required to be included in a Development Proposal, though HUD reserves the right to request additional

¹ Use of “may” rather than “must” implies that use of the form is optional—but already requires use for Section 30 and for Refinancing of Existing Projects (or Refi). The Proposal should be revised to either (1) identify applicable sections for non-mixed-finance projects or (2) refer to separate guidance to determine applicability.

² Delete all references to Local Non-Traditional Development (LNT).

information, or to require less information, to carry out its review. In addition, for mixed-finance and Choice Neighborhoods projects, this document identifies additional documentation needed to enable HUD to complete a Subsidy Layering Analysis for the project, as required under section 102(d) of the HUD Reform Act of 1989.

For non-mixed-finance public housing development, the Development Proposal and all attachments must be submitted to the appropriate HUD Field Office.

For mixed-finance projects, Choice Neighborhoods projects, or other non-public housing development, the Development Proposal and all attachments must be submitted to the Office of Public Housing Investments at HUD Headquarters. PHAs should work with their assigned HUD Project Manager to prepare the Development Proposal. Submission must be made well in advance of closing to allow adequate time for review and approval.

Section 1: Project Information

PHA: [_____]

Project Name: [_____]

[_____] (Old Name, if applicable)

[sections omitted]

PIC Project Number (if applicable): [_____]

Project Type (check all that apply):

- Choice Neighborhoods
- Conventional Public Housing Development
- HOPE VI Local, Non-Traditional Development (MTW agencies only)³
- Main Street
- Mixed-Finance

³ Delete references to Local Non-Traditional Development.

- Mixed-Finance (Operating Subsidy Only)
- Refinancing⁴
- Section 30
- Other: Please describe: _____

Section 2: Project Description - omitted from markup

Section 3: Site Information – omitted from markup

Section 4: Key Development Partners and Participating Parties – omitted from markup.

Note the commentary discussions about “ownership and control” for the Faircloth to RAD Development Proposal

Section 5: Project Schedule* - omitted from markup

Section 6: Compliance with Multifamily Design and Accessibility Requirements – partially omitted from markup.

Note the commentary discussion questioning relevance of newly required submissions and HUD capacity to review with current staffing.

Plans for **mixed-finance projects**⁵ will be reviewed by a HUD architect. Before submitting plans (including a half size set of construction drawings and specifications), the PHA should consult with the HUD Project Manager to determine where the plans should be sent and in what format.

⁴ Clarify which sections apply to transactions other than mixed-finance.

⁵ A licensed architect should review all submissions in Section 6, not just mixed-finance. Only they have the training to review efficiently and appropriately.

Section 7: Project Costs⁶

Type	Number/Amount	Percent of Total
Public Housing Units/ Replacement Housing Units		
Non-Public Housing Units		
Total Housing Units		100%
Public Housing Funds (Including CN or MTW Funds)		
Non-Public Housing Funds		
Total Funds		100%

Section 9: Project Fees – Developer and Contractor Fees—instead of manual insertion, Proposal should refer to Calculator or autofill from Calculator.

A. Calculation and Pay Out of Developer Fee⁷

- Total Amount of Developer Fee: \$ = % of project costs
- Amount of Fee Paid to Developer: \$ = % of project costs
- Amount of Fee Paid to PHA: \$ = % of project costs

⁶ The Proposal should refer to the Sources in Calculator (or autofill from it) instead of requesting manual insertion.

⁷ The amounts, including breakouts between developer and PHA are already covered in the Calculator. No need to duplicate here, manually, which requires update each time the budget shifts.

B. Contractor Fees⁸

Contractor Fee	Amount	% of Hard Construction Costs
Profit		
Overhead		
General Conditions + Performance Bond		
TOTAL		

⁸ The amounts are already covered in the Calculator. No need to duplicate here, manually, which requires update each time the budget shifts.

Exhibit B

**Mixed-Finance ACC Amendment
and
Declaration of Trust/Restrictive Covenants**

**Material differences in permitted transfers – See C. and D.
[Red text is the MF AC Amendment; Blue is the Declaration]**

A. Deeds of trust and financing arrangements approved in writing by HUD under the terms of the Mixed Finance ACC Amendment, and transfer of the Project to the beneficiary under any such approved loans, by foreclosure or deed-in-lieu of foreclosure, or to a third-party purchaser at a foreclosure sale, provided that any such transfer shall be subject to the terms of this Declaration;

~~(1) mortgages identified in Exhibit B of this Mixed Finance Amendment which have been approved by HUD,~~

B. ~~(2) dwelling~~ Dwelling leases with eligible families ~~for~~ and lease of other spaces and facilities in the Project ~~Units; and~~

C. Conveyance or otherwise dispose of any real or personal property which is determined and approved by HUD to be excess to the needs of the Project;

D. Dedication of land for use as streets, alleys, or other public rights-of-way, and grants and easements for the establishment, operation, and maintenance of public utilities; and

E. ~~(3) normal~~ Normal uses associated with the operation of the Project, to the extent authorized by the ACC.

The Declaration includes the following two paragraphs, but the Mixed-Finance ACC Amendment does not:

(D) Notwithstanding the foregoing, the prior approval of HUD shall not be required for the exercise by the investor, i.e., limited partner, limited owner, etc. or its affiliates of their rights to remove a Controlling Interest of the Owner Entity and to designate an affiliate of the investor as a substitute Controlling Interest under the terms of the Partnership Agreement or Operating Agreement, provided that HUD is given prior written notice of default under the Partnership Agreement or Operating Agreement and of the exercise of the removal and appointment right therein (the “Notice”). However, HUD consent shall be required for the appointment of such substitute Controlling Interest to extend beyond a ninety (90) day period. Such 90-day period will commence on the date of the Notice (the “Interim Replacement Period”). With notice to HUD, the Interim 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 all other parties, 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 under the Partnership Agreement or Operating Agreement, and that the Project continues to be operated in a manner consistent with the Applicable Public

Housing Requirements. Notwithstanding the foregoing, any rights of the investor or its affiliates to appoint a substitute Controlling Interest pursuant to this paragraph remains subject to the prior written approval of the Authority.

(E) HUD and the Authority authorize the Controlling Interest to collaterally assign and pledge its interest in the Owner Entity to a Bridge Lender in connection with a Construction Loan Agreement between the Bridge Lender and the Owner Entity dated on or about the date hereof, and to allow the Bridge Lender to exercise any of its rights pursuant thereto, so long as the Bridge 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 Authority shall be required for the appointment of any substitute Controlling Interest (including Bridge 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 Authority 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 Authority 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 or Operating Agreement and that Project continues to be operated in accordance with the Applicable Public Housing Requirements.