

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 964

[Docket No. FR-4501-F-02]

RIN 2577-AC12

Direct Funding of Public Housing Resident Management Corporations

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: On October 21, 1999, HUD published a proposed rule to revise its regulations regarding resident participation and resident opportunities in public housing. The rule proposed that a resident management corporation (RMC) may receive capital and operating funds from HUD if the RMC has primary management responsibility for the public housing project and HUD determines that the RMC has the capacity to effectively discharge such responsibility. This rule makes final the policies and procedures contained in the October 21, 1999 proposed rule, and takes into consideration the public comments received on the proposed rule. After careful consideration of all the public comments received on the October 21, 1999 proposed rule, HUD has decided to adopt the proposed rule without change.

DATES: *Effective Date:* August 9, 2000.

FOR FURTHER INFORMATION CONTACT: Paula Blunt, Associate Deputy Assistant Secretary, Department of Housing and Urban Development, Office of Public and Indian Housing, 451 Seventh Street, SW, Room 4226, Washington, DC 20410; telephone (202) 619-8201 (this is not a toll-free telephone number). Persons with hearing or speech disabilities may access this number via TTY by calling the free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION

I. Statutory Background

A. Resident Management of Public Housing

Section 20 of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (referred to as the "1937 Act") encourages resident management of public housing projects as a means of improving existing living conditions in public housing. HUD has implemented section 20 in its regulations at 24 CFR part 964 (entitled "Tenant Participation and Tenant Opportunities in Public Housing").

Under section 20, and 24 CFR part 964, public housing residents may form

resident management corporations (RMCs) for the purposes of managing public housing. The RMC enters into a management contract with the public housing agency (PHA) establishing the respective management rights and responsibilities of the RMC and the PHA. The contract may provide for the RMC to perform any or all of the management functions for which the PHA is responsible to HUD. The performance of the RMC is subject to periodic review by the PHA to ensure that the RMC complies with all applicable requirements and standards of performance.

B. Public Housing Reform

On October 21, 1998, President Clinton signed into law the Quality Housing and Work Responsibility Act of 1998 (Title V of the Fiscal Year 1999 HUD Appropriations Act; Public Law 105-276; 112 Stat. 2461, 2522) (referred to as the "Public Housing Reform Act"). The Public Housing Reform Act constitutes a substantial overhaul of HUD's public housing and Section 8 assistance programs. The changes made by the Public Housing Reform Act are directed at revitalizing and improving HUD's public housing and Section 8 tenant-based programs. These changes are also designed to provide for more resident involvement, and to increase resident participation and awareness in creating and maintaining a positive living environment.

II. The October 21, 1999 Proposed Rule

On October 21, 1999 (64 FR 56890), HUD published a proposed rule to amend 24 CFR part 964. The purpose of the proposed rule was to implement the statutory changes made to section 20 of the 1937 Act made by section 532 of the Public Housing Reform Act. Section 532 of the Public Housing Reform Act provides for the direct provision of capital and operating assistance to an RMC if: (1) The RMC petitions HUD for the release of the funds; (2) the management contract between the RMC and the PHA provides for the RMC to assume the primary management responsibilities of the PHA; and (3) HUD determines that the RMC has the capability to effectively discharge such responsibilities.

The proposed rule provided that HUD would consider this third requirement to be satisfied if the RMC is designated at least a "standard performer" under the Public Housing Assessment System (PHAS) (see 24 CFR part 902); and the RMC is not in violation of any financial, accounting, procurement, civil rights, fair housing, or other program requirements that HUD determines call

into question the capability of the RMC to effectively discharge its responsibilities under the contract.

In all other cases where direct funding to an RMC is not provided, operating and capital funding would be provided to the RMC by the PHA. If HUD provides direct funding to an RMC, the PHA would not be responsible for the actions of the RMC.

In addition to implementing section 532 of the Public Housing Reform Act, the October 21, 1999 proposed rule also proposed to make one clarifying change to 24 CFR part 964. Specifically, the rule proposed to revise § 964.225 (entitled "Resident management requirements") to clarify that an RMC must be in compliance with any local licensing requirement, or other local requirement governing the qualifications or operations of a property manager.

The preamble to the October 21, 1999 proposed rule provides additional information regarding the changes to 24 CFR part 964.

III. This Final Rule

This final rule makes effective the policies and procedures contained in the October 21, 1999 proposed rule. The public comment period for the proposed rule closed on December 20, 1999. HUD received three public comments on the proposed rule. Comments were submitted by a national RMC organization, a law firm representing several RMCs, and a public housing resident council. HUD appreciates the suggestions offered by the commenters and carefully considered the issues raised by them. For the reasons discussed below, however, HUD has chosen not to implement their suggestions. After careful consideration of the public comments, HUD has decided to adopt the October 21, 1999 proposed rule without change. This following section of the preamble presents a discussion of the significant issues raised by the public commenters and HUD's responses to their comments.

IV. Discussion of the Public Comments Received on the October 21, 1999 Proposed Rule

A. Support for Proposed Rule

One of the commenters expressed support for the proposed rule. The commenter wrote that it "strongly support[s] the regulations to permit direct funding of resident management corporations by HUD." The commenter also wrote that the "direct funding of resident management corporations is essential."

B. Comments Beyond Scope of Proposed Rule

As discussed above, the purpose of the October 21, 1999 proposed rule was to implement section 532 of the Public Housing Reform Act. Several of the commenters submitted comments that did not concern the direct funding of RMCs and, therefore, were beyond the scope of the proposed rule. For example, one of the commenters recommended that HUD should clarify what comprises a duly constituted RMC. Two commenters suggested that the final rule should provide for RMC participation on the PHA's board of commissioners, or similar governing body. Another commenter suggested that public housing management contracts should be developed with the full participation of RMCs and their national organizations. There were also several other public comments that, although suggesting general changes to HUD's resident participation regulations at 24 CFR part 964, did not concern the proposed regulatory amendments described in the October 21, 1999 proposed rule.

HUD thanks these commenters for their helpful comments and recommendations. However, since these comments do not concern the direct funding of RMCs, HUD has not revised the proposed rule to incorporate the suggestions made by the commenters. These comments will be taken into consideration during HUD's development of a future proposed rule that will implement the other resident related amendments made by the Public Housing Reform Act.

In addition to providing for the direct funding of RMCs, the Public Housing Reform Act makes various other amendments to the statutory requirements regarding resident participation and resident opportunities in public housing. For example, the Public Housing Reform Act requires the participation of residents on the governing board of a PHA (section 505 of the Act) and provides for grant funding of services for public housing residents (section 538 of the Act).

The resident board membership requirements established by section 505 of the Act have been implemented through a separate final rule published on October 21, 1999 (64 FR 56870). The other changes made by the Public Housing Reform Act affecting the part 964 requirements will be the subject of a separate proposed rulemaking. HUD is committed to the development of this proposed rule with the active participation of public housing residents. HUD will solicit resident

input through the scheduling of public forums, solicitations for written comments, and/or other appropriate means.

HUD's goal in undertaking this future rulemaking is to develop a set of easy-to-understand regulations that reflect the meaningful contributions of public housing residents. Accordingly, the proposed rule will not only implement statutory amendments made by the Public Housing Reform Act, but will also streamline and reorganize 24 CFR part 964 to simplify and improve the clarity of HUD's resident participation requirements.

In addition to rulemaking, HUD is also taking several other steps to promote effective resident participation in public housing (see Section V. of this preamble, below).

C. Comments on the October 21, 1999 Proposed Rule

Comment: Standards for determining RMC eligibility for direct funding should be revised to allow for innovative changes and concepts. Two commenters objected to the eligibility standards described in the proposed rule. The commenters suggested that the final rule should provide greater flexibility in determining RMC eligibility for direct funding.

HUD Response. As noted above, section 532 of the Public Housing Reform Act establishes the conditions that an RMC must satisfy in order to receive direct funding. Specifically, the statute provides that an RMC may directly receive capital and operating assistance, if: (1) The RMC petitions HUD for the release of the funds; (2) the management contract between the RMC and the PHA provides for the RMC to assume the primary management responsibilities of the PHA; and (3) HUD determines that the RMC has the capability to effectively discharge such responsibilities. The language of the October 21, 1999 proposed rule, and this final rule, merely track the statutory language of section 532.

Only the third requirement described above provides HUD with discretion in determining whether an RMC is eligible to receive direct funding. This final rule provides that HUD will consider this third requirement to be satisfied if the RMC is designated at least a "standard performer" under the PHAS, and the RMC is not in violation of any financial, accounting, procurement, civil rights, fair housing, or other program requirements that HUD determines call into question the capability of the RMC to effectively discharge its responsibilities under the contract.

This third requirement will not impose any new requirements on RMCs. The final rule reflects existing performance measures and program requirements that RMCs must already comply with. For example, RMCs are already subject to the PHAS performance measures described in 24 CFR part 902. Further, RMCs are currently required to comply with all applicable program, civil rights, and financial requirements as a condition of assistance under HUD's public housing programs.

Although HUD welcomes "innovative changes and concepts" in the development of its regulations, the commenters did not provide specific recommendations for HUD's consideration. Further, HUD believes that the use of the existing measures described above will allow HUD to accurately determine RMC management capability, while minimizing the burdens imposed on RMCs. Accordingly, the proposed rule has not been revised.

Comment: Determination of eligibility for direct funding should be made in consultation with RMCs. One commenter suggested that HUD should be required to consult with RMCs currently receiving direct funding, or with an RMC national organization, before making a determination on an RMC's request to receive direct funding.

HUD Response. Section 532 of the Public Housing Reform Act provides that an RMC is eligible for direct funding if (among other requirements) "the Secretary determines that the [RMC] has the capability to effectively discharge" the primary management responsibilities of the PHA. This statutory language makes clear that the responsibility for determining whether an RMC is eligible to receive direct capital and operating assistance rests with the Secretary.

Further, as noted in the response to the preceding comment, section 532 establishes very specific criteria that HUD must use in determining whether an RMC is eligible for direct funding. Where the statute provides HUD with discretion, HUD has chosen to rely on current and familiar requirements (such as compliance with the PHAS and applicable civil rights requirements). The use of already existing measures will allow HUD to accurately and expeditiously determine whether an RMC has the required management capability to directly receive funding. The establishment of an additional consultation procedure has the potential to unnecessarily delay HUD eligibility determinations. Accordingly, HUD has

not adopted the suggestion made by the commenter.

Comment: Final rule should establish time frame for HUD approval of direct funding requests. Two commenters suggested that the final rule should provide a time frame “under which HUD must respond to a RMC’s request for direct funding.” One of the commenters recommended that the time period not be longer than thirty (30) days.

HUD Response. HUD has not adopted the revision recommended by these commenters. HUD will endeavor to process all RMC petitions for direct funding as expeditiously as possible. As noted above, HUD will rely on current and well-known measures in determining whether an RMC is eligible for the direct receipt of capital and operating assistance. The use of these existing requirements will facilitate HUD’s processing of RMC petitions, and help to ensure that HUD’s eligibility determinations are made on a timely basis. Therefore, HUD believes that the establishment of the suggested deadline is unnecessary.

Comment: The final rule should provide mechanism for an RMC to appeal a HUD denial of request for direct funding. Two commenters made this suggestion.

HUD Response. HUD has not adopted the revision recommended by these commenters. HUD would prefer to solicit public comment before establishing the suggested appeals process, or any other similar procedural remedy available to an RMC that has been denied direct assistance. Rather than delay the effectiveness of this final rule in order to solicit additional public comment, HUD is proceeding to finalize the October 21, 1999 proposed rule without incorporating the commenter’s recommendation. HUD will more fully consider the suggested appeals mechanism during its development of the future proposed rule amending 24 CFR part 964 in its entirety.

V. HUD’s Ongoing Efforts To Promote Effective Resident Participation

To further promote effective resident participation in public housing, HUD is taking various steps to promote resident involvement in creating and maintaining a positive living environment. As discussed above, HUD is developing a proposed rule that will implement the resident related amendments made by the Public Housing Reform Act. HUD is committed to developing this proposed rule with the active participation of public housing residents. HUD is taking several other steps to increase resident

participation in public housing. For example, HUD will conduct training for resident organizations and PHAs on the new Public Housing Reform Act.

VI. Findings and Certifications

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). That Finding remains applicable to this final rule and is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) (the RFA), has reviewed and approved this final rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The reasons for HUD’s determination are as follows:

(1) *A Substantial Number of Small Entities Will Not be Affected.* The final rule is exclusively concerned with public housing agencies that contract with RMCs for the management and operation of specific public housing projects. Specifically, the rule would make various conforming amendments to 24 CFR part 964 (captioned “Tenant Participation and Tenant Opportunities in Public Housing”) to reflect statutory changes made by the Public Housing Reform Act. Under the definition of “Small governmental jurisdiction” in section 601(5) of the RFA, the provisions of the RFA are applicable only to those few public housing agencies that are part of a political jurisdiction with a population of under 50,000 persons. The number of entities potentially affected by this rule is therefore not substantial.

(2) *No Significant Economic Impact.* The Public Housing Reform Act improves and simplifies the way in which PHAs and RMCs are funded. Specifically, section 519 of the Public Housing Reform replaces funding under the existing Performance Funding System (PFS) with formula funding under the new Operating Fund and the Capital Improvement Assistance Program (CIAP) and the Comprehensive Grant Program with formula allocations

under the new Capital Fund. The implementation of section 519 is beyond the scope of this proposed rule. Accordingly, the economic impact of this final rule is not significant, and it will not affect a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This final rule will not impose, within the meaning of the UMRA, any Federal mandates on any State, local, or tribal governments or on the private sector.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule will not have federalism implications and will not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Regulatory Planning and Review

The Office of Management and Budget has reviewed this rule under Executive Order 12866 (captioned “Regulatory Planning and Review”) and determined that this rule is a “significant regulatory action” as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection during regular business hours (7:30 a.m. to 5:30 p.m.) at the Office of the General Counsel, Rules Docket Clerk, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500.

List of Subjects in 24 CFR Part 964

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 964 as follows:

PART 964—TENANT PARTICIPATION AND TENANT OPPORTUNITIES IN PUBLIC HOUSING

1. The authority citation for part 964 is revised to read as follows:

Authority: 42 U.S.C. 1437d, 1437g, 1437r, 3535(d).

2. Amend § 964.225 as follows:

a. Redesignate paragraphs (h), (i), (j), and (k) as paragraphs (i), (j), (k), and (l), respectively;

b. Add new paragraph (h); and

c. Revise newly designated paragraph (j).

The addition and revisions to § 964.225 read as follows:

§ 964.225 Resident management requirements.

* * * * *

(h) *Direct provision of operating and capital assistance to RMC.* (1) *Direct provision of assistance to RMC.* The ACC shall provide for the direct provision of operating and capital assistance by HUD to an RMC if:

(i) The RMC petitions HUD for the release of funds;

(ii) The contract provides for the RMC to assume the primary management responsibilities of the PHA;

(iii) The RMC has been designated as at least a “standard performer” under the Public Housing Assessment System (PHAS) (see 24 CFR part 902); and

(iv) The RMC is not in violation of any financial, accounting, procurement, civil rights, fair housing or other program requirements that HUD determines call into question the capability of the RMC to effectively discharge its responsibilities under the contract.

(2) *Use of assistance.* Any direct capital or operating assistance provided to the RMC must be used for purposes of performing eligible activities with respect to public housing as may be provided under the contract.

(3) *Responsibilities of PHA.* If HUD provides direct funding to a RMC under paragraph (h)(1) of this section, the PHA

is not responsible for the actions of the RMC.

* * * * *

(j) *Bonding, insurance, and licensing.*

(1) *Bonding and insurance.* Before assuming any management responsibility under its contract, the RMC must provide fidelity bonding and insurance, or equivalent protection that is adequate (as determined by HUD and the PHA) to protect HUD and the PHA against loss, theft, embezzlement, or fraudulent acts on the part of the RMC or its employees.

(2) *Licensing and other local requirements.* An RMC must be in compliance with any local licensing, or other local requirement, governing the qualifications or operations of a property manager.

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Dated: May 8, 2000.

Harold Lucas,

Assistant Secretary for Public and Indian Housing.

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