

Preservation Working Group Preservation Priorities for HUD, 2022

The following recommendations come from the Preservation Working Group, a national coalition of housing owners, developers, advocates, tenant associations, and state and local housing agencies dedicated to the preservation of multifamily housing for low-income families. The recommendations represent no-cost measures that HUD can and should take to prioritize the preservation of existing affordable housing. They are divided into four broad categories: preserving troubled properties (page 1), preserving rental assistance (page 6), improving the energy efficiency of properties (page 11), and engaging and protecting residents (page 12).

If you have any questions, please reach out to Priya Jayachandran (pjayachandran@nhtinc.org) or Laura Abernathy (labernathy@nhtinc.org) at National Housing Trust.

Preserving Troubled Properties

PWG shares with HUD a deep commitment to prevention and alleviation of distress in HUD's assisted multifamily portfolio. Our primary ask today is for a continuing dialogue, based on existing HUD mandates and tools, on prevention and resolution of distress, as the best way to serve our common purpose to serve the residents and their communities.

Our comments are grouped into four areas: Oversight; Proactive Early Detection; Enforcement and Resolution; and Tenant Engagement in Oversight and Enforcement.

Oversight Recommendations

- Use of existing HUD mandates and tools to ensure long-range stewardship and property sustainability
- HUD Staffing and Program Management
 - Training— HUD must provide training to all of its staff to build their capacity and knowledge about HUD's programs, tools, and authority to bring distressed assets back into compliance. Field staff should be encouraged to build relationships with state and local stakeholders with the intent of working collaboratively to preserve the asset and the properties' affordability
 - What's the current status of the NSPIRE Demo— What adjustments to standards, protocols, and processes is HUD considering prior to nationwide implementation?
 - HUD should provide tenants and advocates with an opportunity to give feedback about the NSPIRE model using focus groups and listening sessions. HUD should use these stakeholder meetings as an opportunity to share with stakeholders early lessons learned.

- HUD must create a system that proactively detects and warns of properties at-risk of becoming troubled. Increase stakeholder engagement in oversight process, including identification of acute property issues.
- Coordination with the Office of the Secretary and FHEO, when there are large property owners who are failing to maintain their projects or where there are questions concerning if these owners' actions violate civil rights laws.
- Coordination with REAC regarding the NSPIRE demonstration
 - The Real Estate Assessment Center (REAC) has expressed interest in reinstating resident surveys as part of the physical inspection process. The NSPIRE demonstration provides an opportunity to work with resident leaders on the structure of the resident survey and to test the integration of a resident survey into the physical inspection process. HUD should take advantage of the opportunity and include tenant surveys as part of the NSPIRE model and demonstration
- Management and Occupancy Reviews– We support increased use of MORs as an early detection tool for poor conditions and poor management practices at assisted properties
 - MORs should be prioritized where there are tenant complaints local information, or data (i.e., code violations, local building court or administrative actions) of poor conditions or poor management practices
- Improve assessment of owners/removal of bad owners from HUD’s housing programs
 - Improved 2530 clearance form - ensure that the form captures all agents and affiliates of the new owner, so that bad owners cannot evade their prior poor performances through the development of a new LLC.
 - TPA review should prioritize a quality assessment of physical conditions, operating characteristics, market issues and resident needs and have a parallel review to determine if the new owner has the financial and operational capacity to timely address those needs in a remediation plan. The TPA assessment should also flag buyers (including their affiliates) with open fair housing complaints and those with a track record of failing to improve troubled assets. HUD must be diligent and vigilant in its oversight and enforcement of its conditions standards with the new owner following the transfer of a troubled asset.
- Incorporation of an assessment of the environmental hazards (including water and soil) and property's siting into HUD’s physical inspection process
- Adopt a transparent methodology for identification of post-Mark-to-Market restructured properties that are in operational difficulty due to OCAF- only contract rent increases, and development of proactive asset management needs of these properties.
- HUD must incorporate local code enforcement records into its records for assisted properties.

Proactive Detection Recommendations

- Use existing HUD mandates and tools to ensure long-range stewardship and property sustainability. At each property HUD, must:
 - Where warranted, utilize existing HUD rights to replace management or owner
 - Identify core problems to be addressed for long-term sustainability
 - Coordinate immediate health & safety repairs with appropriate forbearance, with accountability, for new owners committed to restoration
 - Withhold the subsidy where appropriate and not harmful to operating condition
 - Prohibit distributions during default
- The HUD Secretary and OAMPO should take steps to work with HUD OGC to implement judicial remedies such as receivership and Mortgagee-in-Possession where warranted
- See note above regarding 2530 clearance process.
- Transfer of Physical Assets (TPA overhaul) - TPA review should prioritize a quality assessment of physical conditions along with a parallel review to determine if the new owner has the financial and operational capacity to timely address those needs in a remediation plan (which will capture where the buyer is paying too much for the asset and then will not have the funds for rehab). The TPA assessment should also flag buyers (including their affiliates) with open fair housing complaints and those with a track record of failing to improve troubled assets.
 - What is the effect of recent "TPA" protocol changes pending Handbook 4315.1 revision on preventing transfers to bad ownership? Transparency and consistency are needed regarding changing protocols for traditional TPA and other processes such as assignment of a Section 8 PBRA HAP contract.

Enforcement and Resolution Recommendations

- Adopt a policy of taking additional enforcement actions when a property continues to be non-compliant after the given compliance date
 - HUD must be transparent about how it uses its tools to bring properties back into compliance. HUD should make publicly available where in the enforcement process individual troubled properties are and be clearer with local officials, advocates, and tenants about the process. Otherwise, local officials may inadvertently act contrary to HUD's preservation goals (i.e., condemnation action) and tenants may leave out of the belief that no one is coming to their aid (i.e., Forest Cove in Atlanta)
 - HUD must be transparent about its rationale for determining which tools to use when attempting to bring properties back into compliance

- HUD HQ must encourage field staff to develop collaborative relationships with local and state stakeholders and to not limit tenants and tenant advocates to rely only on PBCAs when there is a pattern of poor conditions.
- Use of existing HUD mandates and tools to ensure long-range stewardship and property sustainability
 - HUD Secretary and OAMPO will take steps to work with HUD OGC to implement these tools
- Maximize opportunities to coordinate enforcement in conjunction with state & local government and preservation stakeholders. This is especially important when state/local resources are needed to rehabilitate the site
- Preservation of project-based rental assistance: use Section 8(bb) and Section 209 to the maximum feasible extent to prevent recapture of budget authority, but ensure that tenants are consulted and are the beneficiaries of the preservation
 - Use remaining budget authority for rehabilitation of properties (see RD model)
- Consider adopting a structured methodology for relief of unsupportable HUD-held debt, such as Flexible Subsidy. See Notice H 2021-2 as an example in the M2M portfolio,

Incorporation of Tenants into HUD oversight and Enforcement Processes

- Provide a means for residents to request a physical inspection and/or a management review of a property (see note above about MORs)
- PBCA must improve meaningful response of tenant concerns as a mechanism to detect conditions and management concerns. Ideally, the increased PBCA vigilance should detect potential issues at assisted properties early.
 - HUD must intervene earlier where there have been reports of systemic issues at assisted properties; PBCAs must elevate these issues to HUD field office (i.e., failure to maintain conditions, failure to properly recertify tenants) rather than prolonging bringing the property into compliance
- Create a mechanism for residents to withhold rent in an escrow account, as prescribed by the Secretary, as a result of documented habitability concerns
 - HUD should also withhold its portion of the rent in units where there are ongoing documented habitability issues and the tenant withholds their portion of the rent in response to habitability issues
 - HUD can also harmonize the PBRA leases to mirror the protections granted to public housing residents. See [24 CFR 966.4\(h\)](#).
 - PBCAs must be empowered to abate individual Section 8 units if an owner fails to correct EH&S conditions or fails to address the physical inspection conditions. See

Guidebook for Section 8 Contract Administration, DRAFT, March 15, 2001, Ch. 7, Section 7-6.

- Consult tenants during the development of a remediation plan
- Please see the “Engaging and Protecting Tenants” recommendations on page 12

Preserving Rental Assistance

Notice H-2015-03, issued April 3, 2015, provides guidance on transferring Budget Authority of a Project-Based Section 8 Housing Assistance Payments Contract under Section 8(bb)(1) of the United States Housing Act of 1937. Through Section 8(bb), Congress provided HUD with a powerful tool for preserving Section 8 budget authority, but administration of this authority is unnecessarily cumbersome and time consuming, contributing to the permanent loss of subsidy at a time of unprecedented need. Tenants in the developments where 8(bb) transfers are sought are often not the beneficiaries of that transfer, due to confusion over what vouchers they are to receive and changes to contract terms upon transfer.

HUD, under its current authority, could streamline the transfer process by increasing internal process coordination and eliminating unnecessary steps; ensure no subsidy is lost by establishing a preservation reserve; improve outcomes by eliminating the requirement for the current owner to actively participate in the 8bb transfer process; and identify receiving projects by utilizing Performance Based Contract Administrators. HUD could also make clear that tenants in properties undergoing 8(bb) transfers are entitled to enhanced vouchers (and thus, have a statutory right to remain at the premises if it remains rental housing) and emphasize that there is a front-end civil rights review before transfer that should consider if the transfer will result in the budget authority being moved to a low-opportunity area, result in a change in housing type, or unit size.

Increased HUD/PBCA Coordination for 8bb Processing

- Centralize processing within single HUD team at HUD Headquarters/Recap (or at a Regional Center well-versed in 8bb) that coordinates any required reviews by the local Field Office, PD&R, FHEO, HUD OGC, etc.
- Provide HUD Transaction Manager (at HQ or Regional Center) with overall responsibility for coordinating HUD processing.
- Establish “critical path” time-line for completion of specified components of 8bb processing.
- Establish schedule for regular video-conferences among transaction participants (including Transaction Manager) to address/resolve processing issues.
- Cause HUD and PBCAs to play active role in encouraging/facilitating 8bb transfers.
 - HUD and PBCAs should make available to “Qualified Entities” (entities approved in advance by HUD as potential candidates for 8bb transfers) a list of HAPs that may be candidates for 8bb transfers – e.g., owner has given notice of opt out; HAP is to be terminated “for cause.”

Establish “Preservation Reserve”

- The Reserve would preserve budget authority arising from opt outs, HAP expirations and/or HAP terminations “for cause” – and allow budget authority transfers to occur regardless of whether the HAP has stopped providing subsidy at the “transferring project” (“Project A”)

- Eliminate requirement for Project A owner to cooperate/assist in 8bb transfer to “receiving project” (“Project B”). Upon opt out or termination, the budget authority should get automatically transferred to the Reserve.
 - 8bb indicates that if an assistance contract is terminated or is not renewed, or of the contract expires, the Secretary shall transfer the budget authority – and, the transfer “shall be under such terms as the Secretary may prescribe.” No requirement for owner cooperation/assistance.

Budget Authority “In Suspense”

- To preserve the Budget Authority, confirm that the Budget Authority may be held in the Preservation Reserve for an extended period (e.g., 2 to 3 years) to allow potential interested parties to make a future transfer of the budget authority.
- Given that the 8bb statute refers to making the budget authority available for “continued assistance to eligible families, including eligible families receiving the benefit of the project-based assistance at the time of the termination ...,” perhaps HUD could provide a preference for “Qualified Entities” in the HUD specified local market area that (i) have demonstrated experience/commitment to the preservation of affordable housing in the area; and (ii) provide HUD with a “Transfer Plan” that satisfies specified HUD criteria re financing, deconcentration of poverty, improvement of tenants living conditions, ability to close timely, etc.

Help Cover Costs for Owner A to Facilitate 8bb Transfer

- We recognize that HUD does not regulate payments made between Owner A and Owner B relating to a transfer budget authority. But, perhaps HUD could also indicate that HUD “encourages” receiving project owners (or their sponsors) to reimburse Owner A (from non-project funds) for any out-of-pocket costs incurred by Owner A in connection with the proposed transfer. We’d like HUD to do whatever it can to encourage the Owner As to facilitate this process.

Allow Post Rehab Rents

- Clarify “budget neutrality” concept in Notice to permit Project B owner to receive contract rents equal to comparable “post rehab” market rents at Project B provided:
 - (i) Project B owner executes HUD Use Agreement comparable to the Use Agreement required for a Chapter 15 MUTM renewal;
 - (ii) Project B is new construction or undergoes “substantial rehabilitation” (or the same has occurred in the past 2 years);

- (iii) the parties can demonstrate that the proposed transfer will result in material improvements in the living conditions of the assisted tenants and/or location of the assisted housing; and
- (iv) the post rehab budget authority at Project B is capped at the post rehab budget authority that could be realized at Project A pursuant to Option 1/Chapter 15 if Project A underwent a comparable level of rehab/construction.

Expand Scope of Permitted 8bb Transfers

- Establish procedures to allow budget authority transfers of Mod Rehab HAPs and PBV HAPs.
- Recognize use of “pass-throughs” to facilitate use of budget authority during for temporary relocation during rehab/construction period.
- Clarify procedures for local governments to assist with identifying sites for relocation of budget authority if a HAP contract is terminated due to default/enforcement action – and, emphasize need to help ensure subsidy is not transferred to low opportunity communities.

Reduction in Assisted Units:

- Specify conditions under which HUD will consider allowing the Project B owner to reduce the number of assisted units above the current threshold (lesser of 5% or 5 units). For example, permit such a unit reduction (regardless of whether the Project B location has higher rents than the Project A location) if parties can show that:
 - (i) such reduction is necessary to achieve the contract rent levels required to support the financing for the planned rehab/construction;
 - (ii) the proposed transfer will result in material improvements in the living conditions of the assisted tenants and/or the location of the assisted housing;
 - (iii) the proposed transfer will not result in the involuntary displacement of any residents (e.g., the reduction will come from vacant units or other subsidy will be provided to the relocated tenants); and
 - (iv) the proposed transfer will not result in the transfer of subsidy to a low opportunity community or violate any applicable fair housing laws or regulations.

Use of TPVs

- Clarify the circumstances under which regular vouchers or enhanced vouchers (“EVs”) are provided to existing residents at Project A that are unwilling/unable to relocate to Project B, or who no longer have the ability to remain at Project A (e.g., demolition of Project A is planned).

- Clarify that a Section 8bb transaction, which results in the termination of a HAP contract, triggers the statutory requirement for issuance of EVs to qualifying, affected tenants.

Simplify Application Process

- Permit a single application to cover both Project A and Project B components – and to cover multiple phases, if applicable.
- Provide for expedited, up-front review re environmental matters and site-and-neighborhood standards for Project B.
- Prioritize elimination of any redundant or unnecessary reviews – and create checklist identifying items/information required by HUD for processing. For example:
 - Eliminate requirement that Owner A demonstrate there is no longer a need for affordable rental housing at Project A. There are few, if any, areas where there is no such need.
 - Eliminate requirement that Owner A certify it will make all mortgage payments, meet all physical condition standards and management requirements, and be in compliance with all other business agreements imposed by HUD or the lender. These obligations should be imposed under existing agreements – and, subject to the conditions stated therein.
 - Eliminate requirement that Owner A describe the steps it has taken to market vacant units at Project A.
 - Include discrete list of documentation/information that is required (or provide examples) for Project B owner to satisfy HUD’s site and neighborhood standards.
 - HUD checklist should include discrete list of documentation/information that is required for review by FHEO, PD&R, OGC for HUD processing.

Fair Housing Compliance

- Clarify what documentation/information is required (or provide examples) for parties to demonstrate:
 - budget authority is not being transferred from high opportunity communities to low opportunity communities; and
 - budget authority transfer will not result in change in household type (e.g., where Project A is multifamily, but Project B is senior designated) or material change in unit type (e.g., where assisted units in Project A are primarily 2 and 3 bedroom units, but Project B’s assisted units are primarily studios and 1 bedroom units).

- Include discrete list of documentation/information that is required (or provide examples) for Project A and B owners to demonstrate transfer will not violate applicable fair housing laws or related regulations.

Davis Bacon

- Clarify that Davis Bacon wages are not triggered by an 8bb transfer to Project B (regardless of whether Project B involves rehab or new construction), unless Project B will be funded with a separate funding source (e.g., certain types of FHA-insured mortgage loans) that would otherwise trigger Davis Bacon. Similar text is included in Chapter 15, Section 15-13.A.11 of the Section 8 Renewal Guide.

Our Deeper Dive

- PWG previously provided HUD with an extensive mark-up of the 8bb Notice. Recommend that HUD review the mark-up and provide response to proposed changes.

Improving the Energy Efficiency of Properties

HUD has acknowledged the importance of investing in climate and energy retrofits of existing housing to reduce utility costs and cut greenhouse gas emissions.¹ Fortunately, there are no-cost actions that HUD can take to help affordable housing providers access the resources they need to improve the energy efficiency of their properties.

Extend RAD UA shift to other HUD programs

- The Rental Assistance Demonstration (RAD) program allows contract rents to be increased by 75% of the value of tenant-paid utility savings when site-specific UAs are used if the conversion results in a demonstrable reduction.² Consistently allowing rents to increase in proportion to utility allowance decreases that are the result of energy savings from a recapitalization/retrofit event address the “split incentive”— a major impediment to energy efficiency.
 - The split incentive is when in cases where residents pay their utility bills directly, property owners have no expected economic return or incentive to invest in more efficient energy and water systems whereas when all utilities are included in rent, residents lack an incentive to conserve energy in their homes. HUD should expand the RAD approach to tenant paid utility savings to other kinds of rental assistance contract rent-setting scenarios.

Work with DOE to clarify that WAP funds can be provided in the form of a loan

- The DoE’s Weatherization Assistance Program (WAP) received a significant funding infusion from the 2021 Investing in Infrastructure and Jobs Act, making it a potentially significant resource to fund climate and energy retrofits in HUD-assisted housing; and recently HUD and DoE have collaborated to generate new guidance facilitating WAP investments in the HUD-assisted inventory. In order to ensure that LIHTC-funded properties in the HUD-assisted portfolio can access WAP funding, HUD should encourage DoE to clarify that WAP funds may be contributed to assisted projects as either a grant or a loan.
 - Loans are often preferable in the LIHTC context because grant funding often creates tax liability for LIHTC properties, but DoE has previously (in 2010) indicated that loans of WAP funds are not permissible (despite that there is no prohibition on loans in WAP enabling legislation or regulations, and ample precedent for loans in other comparable DoE and HUD programs).

¹ https://www.hud.gov/climate/reducing_greenhouse_gas

² H-2019-09 PIH-2019-23 (HA), Rental Assistance Demonstration REV-4 – Final Implementation, pg. 139

Engaging and Protecting Residents

Strengthening and Enforcing Tenant Organizing in HUD's Housing Programs

In its regulations, HUD recognizes the importance and benefit of resident participation in the creation and operation of HUD's housing programs, including the good physical condition of and proper maintenance of the property.³ And while some of HUD's processes include engagement of tenants, tenants and advocates have been voicing ways in which the agency can deepen its commitment and the efficiency of the engagement of tenants to further its goal of preservation, particularly, where sizable shifts are happenings at the property (i.e., extensions of the contract, transfers of the budget authority, conditions, etc.).

- Extend the Right to Organize protections to all Project-Based Voucher tenants
- Enforce 24 CFR § 245 against owners and management whose actions interfere with or disincentivize tenant organizing, regardless of the intent of the owner or management.
 - Issue guidance on appropriate civil monetary penalties (CMPs) for interfering with 24 CFR pt. 245 activities and when to use other enforcement mechanisms
 - Creation of a central reporting system for 24 CFR pt. 245, where tenants can report alleged violations (*see the RAD model*).
- Obligate and spend funding available through Section 514 (of MAHRAA) for resident organization operations and capacity building (through outreach and training of residents as well as with technical assistance) to better enable residents to preserve their homes
 - HUD should provide multiple-year grants, not cooperative agreements, to qualified, locally-based nonprofit tenant assistance groups at the local, citywide or statewide levels
 - HUD should ensure that all Section 514 funding is predominately used for tenant capacity-building, education, and training assistance. Section 514 is a scarce resource used to fund tenant organizing; it is the only HUD resource used to fund tenant organizations representing assisted-families living in assisted, privately-owned housing.
 - Section 514 recipients should be given maximum flexibility to work in broadly eligible privately-owned, federally-assisted multifamily housing, including all Section 8, LIHTC, Rural, and CARES Act eligible housing
 - New programming should emphasize health and safety conditions (in addition to preservation of at-risk housing), including remediation of substandard housing, environmental hazards, social isolation and bullying, and broad recovery from COVID-19
- HUD should post opt-out notices and Section 8(bb) transfer applications to its website

³ 24 C.F.R. § 245.100.

- Provide public access to Management and Occupancy Reports and all other relevant, associated documents

Incorporation of Tenants into HUD Oversight and Enforcement Processes

The enforcement of HUD's conditions standards has historically been identified as a process where more tenant engagement and incorporation into the process would be extremely beneficial to the program.⁴ It's often cited as an important issue area in HUD's materials about tenant organizing.⁵ Our recommendations focus on how to improve HUD's current assessment process by meaningfully incorporating tenants into the oversight and enforcement process. It's important that we be intentional in partnership and work towards moving the Tenant Empowerment Act (TEA) towards enactment. And where within HUD's current authority, implement provisions included in TEA. It is critical tenants be consulted as the critical stakeholder when developing preservation and remediation plans.

- Support the passage of the Tenant Empowerment Act, 2021
- Provide a means for residents to trigger a physical inspection and/or a management review of a property by presenting 25% signatures from residents of a property
- Provide means for residents to participate in the physical inspection and/or management review of their properties.
- Consult tenants during the development of a remediation plan
- Create a similar mechanism as described in NAHT's Tenant Empowerment Bill allowing tenants to withhold rent in escrow and trigger HUD
- Make inspection reports and other basic property information such as subsidy contracts and regulatory agreements available permanently to residents for review and free copy
 - Amend regulation 24 CFR §200.857(g)(2)(ii) by striking the last clause of the sentence.
- Revise MOR checklist in Handbook 4350.1 to address widespread problems experienced by applicants and participants, such as waitlist irregularities, improper evictions, harassment of tenant organizations, failure to provide documents or receipts to tenants when requested, or improper House Rules
- Create an enforcement and sanction mechanism for the failure to correct MOR deficiencies, with input from affected residents and resident organizations
- Creation of an early warning system to flag properties on their way to being troubled, including a process to identify a pattern of troubled properties with the same owner or management agent where tenants are flagging conditions concerns despite passing REAC scores.

⁴ NSPIRE Resident Engagement Initiative, HUD.gov, https://www.hud.gov/program_offices/public_indian_housing/reac/nspire/drei (last visited Mar. 11, 2021).

⁵ 24 C.F.R. § 245.5.

- Based upon information it secures from the EPA from the [HUD-EPA MOU](#), HUD should directly consult with the tenants in those affected properties about their desire to move or remain at the site.

Expanding Tenant Protections in the PBRA Program

In addition to the threat of poor physical conditions, changes in the subsidy often cause tenants to misunderstand their legal rights or they may “get lost” in the process for a variety of reasons—changes to plans without updating tenants, processes have been made opaque to tenants, the lack of an effective method for engaging and updating tenants.

- The Office of Multifamily must be an integral part of the process of structuring tenants’ rights in the final enhanced voucher rule.
 - The final rule must include a “good cause” definition separate from the HCV program that limits evictions to the tenants’ serious breach of their lease, limits rescreening to income eligibility, mandates a specific tenancy addendum, and provides for updated guidance on PHAs harmonizing their rent reasonableness assessment policies with families right to remain.
- Improved tenant protections in the Section 8(bb) process, particularly ensuring that tenants, at all times, have been provided adequate information to make informed decisions throughout the transfer process.
 - Updated guidance on Section 8(bb) to explicitly state families who choose to remain will receive an Enhanced Voucher.
 - Where tenants elect to convert those enhanced vouchers to tenant protection vouchers, offer high quality mobility counseling
- Require that tenants receive the net financial benefits, including protections against rent increases, where federal funds are used for infrastructure energy improvements in rental housing.
- PBCAs must improve their documenting and utilization of tenant concerns regarding assisted properties, owners, and management.
- RAD PBRA conversions - tenants/advocates must be able to secure promptly all documents from the PHA, and PHA/developer must post RAD related documents (i.e., relocation plan, lease, redevelopment and relocation timeline) on the PHA’s website)
- Prevent displacement of assisted families during the rehabilitation of properties— Improved standards for pass-through leases and HUD’s oversight (i.e., “comparable unit” analysis).
- When a property’s affordability is lost or to facilitate remediation of the property’s physical conditions, HUD must strengthen relocation requirements, including strict compliance with civil rights laws, providing alternative comparable housing, and offering of high-quality mobility counseling.