PRIVATE FUNDING, PUBLIC HOUSING: THE DEVIL IN THE DETAILS

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ABSTRACT

Public housing, an important component of the social safety net, has long been plagued by insufficient funding. A new federal program seeks to solve the funding challenges by opening public housing to private investment; quite literally, to mortgage public housing in order to save it. Coming, as it does, on the heels of a national foreclosure crisis, this program must be scrutinized carefully, as there is an inherent tension in incentivizing private investors to participate in a public benefit scheme. This Article explains how the new federal program proposes to use public housing developments as collateral. It examines how this use of the private market is a natural extension of the ongoing privatization of federal affordable-housing policy. It argues that the existing public housing funding structure is untenable and that reform is needed. The United States is facing a significant shortage of affordable housing and cannot afford to lose the remaining public housing units. The Article concludes that, conceptually, the private market could be an effective tool to address the long-standing funding challenges. The details of implementation, however, leave much to be desired. The Article identifies areas in which the program should be modified in order to accomplish its stated preservation goals, including protecting against foreclosures, incentivizing preservation, and ensuring tenants have meaningful enforcement mechanisms.

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INTRODUCTION

Public housing in the United States is at a crossroads. The federal public housing program provides 1.2 million affordable government-
owned and operated rental units to the lowest-income renters.\textsuperscript{1} It is one of the largest subsidized housing resources in the country. Yet public housing is a finite and dwindling affordable housing resource. Net new units are not being created, and more than ten thousand units are lost—and not replaced—each year.

The Obama administration has embraced a new program intended to salvage and preserve public housing. The Rental Assistance Demonstration (RAD) program attempts to utilize private market resources to fund the capital needs of public housing developments.\textsuperscript{2} RAD attempts to offset long-standing funding challenges by permitting local governments to mortgage the physical public housing development to obtain much-needed capital to improve and preserve the property.

RAD represents a significant change to federal housing policy. Traditionally, the federal government shielded public housing developments from private lending or use as collateral. Now, in an era of funding shortages, the federal government is looking to access the frozen capital in existing public housing developments. The theory driving RAD is that the developments themselves are untapped real estate assets that can be mortgaged to obtain sufficient private funds to improve and preserve the remaining public housing units.

RAD represents a recognition that the existing public housing funding structure is not sustainable. After decades of federal funding shortages, the public housing stock, largely built in the 1960s and 1970s, is aging; deferred maintenance threatens the future of the program. A recent study found a twenty-five billion dollar backlog in public housing capital needs, with needs continuing to accrue at $3.4 billion a year.\textsuperscript{3} Without sufficient funding to operate and maintain the developments, more and more jurisdictions are attempting to reduce their public housing stock or get out of the public housing business altogether. It is clear that the capital needs of the aging housing stock must be addressed if public housing is to be salvaged and the existing units preserved as affordable housing.

\begin{itemize}
  \item \textsuperscript{1} Kirk McClure, Reduction of Worst Case Housing Needs by Assisted Housing 1 (2011).
\end{itemize}
RAD was passed by Congress in 2012 and is currently functioning as a pilot program. The expectation is that it may eventually spread to the entire public housing inventory. I confess that, as an affordable-housing advocate, I was deeply skeptical of RAD when it was first proposed. Exposing housing developments to the unpredictability of the financial market seemed to portend a threat to the long-term viability of public housing. The specter of a foreclosed public housing development loomed large in discussions on the topic, particularly as RAD was proposed when the country was in the midst of a foreclosure crisis. The foreclosure crisis offers valuable lessons that can shape our approach to RAD and other attempts to use private capital to fill gaps in federal funding.

Part I of this Article will explain the logistics of RAD and how it proposes to use public housing developments as collateral, thereby mortgaging them in an effort to preserve them. Part II examines how this use of the private market in a traditionally government-owned and government-operated public benefit program is a natural progression in the ongoing privatization of federal affordable housing policy. Part III will argue that the existing public housing funding structure is untenable. Absent significant reform, or a commitment of additional federal funding resources, the current structure will continue to result in a loss of public housing units. There is, however, a public interest in preservation. The United States is faced with a significant shortage of affordable housing and cannot afford to lose the remaining public housing units.

Part IV determines RAD could be an effective tool to address the long-standing funding challenges in the public housing program. The Article concludes in Part V, with an argument that the details in RAD’s implementation leave much to be desired from a preservation standpoint. This is due in part to the inherent tension in incentivizing private investors to participate in a public benefit that serves low-income renters. To the extent the public housing financing structure must be modified, the changes must occur in a way that preserves affordable housing for the long term. The Article identifies several areas in which RAD should be modified to help ensure it accomplishes its stated preservation goals. These include minimizing the foreclosure risk, incentivizing preservation of deeply subsidized affordable housing units, and ensuring tenants have meaningful enforcement mechanisms.

I. THE RENTAL ASSISTANCE DEMONSTRATION (RAD) PROGRAM:
MORTGAGING PUBLIC HOUSING TO FILL GAPS IN FEDERAL FUNDING

The Rental Assistance Demonstration (RAD) program seeks to address the outstanding capital needs of public housing developments and to preserve those developments as a long-term source of affordable
housing. Enacted by Congress as a pilot program in 2012, RAD arose out of a debate regarding how best to cope with an aging public housing stock that is badly in need of repairs due, in no small part, to repeated failures by the federal government to adequately fund the program.

At its core, RAD treats public housing developments as valuable but untapped real estate assets that can be mortgaged to leverage much-needed funds. In order to make public housing more attractive to private investors, it also converts the funding stream from an appropriations-dependent formula to a long-term subsidy contract.

A. THE TRADITIONAL PUBLIC HOUSING PROGRAM

To understand why the change RAD proposes is significant, it is worth taking a moment to conceptualize how it is different than the way public housing currently operates.

i. Brief History

Public housing began in the 1930s under the auspices of the New Deal. It was embraced as a means to create construction jobs and provide rental housing for families made “temporarily destitute” by the Great Depression. It was also expected to address the ongoing issue of slum housing in urban areas. Established by the United States Housing

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5 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, at § 1.4. The financing transactions undertaken through RAD are complicated and may involve a variety of public and private financing sources. For the sake of simplicity, this Article will refer to the transactions as mortgaging or leveraging, with the understanding that those terms may not be technically accurate when applied to all possible financing structures permissible under RAD.
6 Id. at § 1.2.
7 See Gordon Cavanaugh, Public Housing: From Archaic to Dynamic to Endangered, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 228, 229 (2005). The first attempt to create public housing under the National Industrial Recovery Act of 1933 contemplated the federal government would own the housing and was found unconstitutional. Id. The public housing program was ultimately enacted through the Housing Act of 1937. Id.; United States Housing Act of 1937, ch. 896, 50 Stat. 888 (1937).
9 Slum housing was long seen as inadequate, unhealthy, and a catalyst for significant social problems. See Peter Marcuse, Mainstreaming Public Housing: A Proposal for a Comprehensive Approach to Housing Policy, in NEW
Act of 1937, public housing was to be funded by the federal government and constructed, owned, and operated by states and localities through branches of local government.\textsuperscript{10}

Public housing was expected to serve working-class families,\textsuperscript{11} and no ongoing federal subsidy was provided to make the units affordable.\textsuperscript{12} Rents were set at the level needed to operate the development, but not make a profit, and rents were thus reasonably affordable.\textsuperscript{13} Public housing, therefore, started its life as a financially stable program.\textsuperscript{14}

In the two decades between the late 1940s and late 1960s, however, public housing underwent a series of significant policy shifts, which resulted in the units’ housing a disproportionately low-income population.\textsuperscript{15} External forces also incentivized the highest-income

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\textsuperscript{10} United States Housing Act of 1937; Von Hoffman, \textit{Contradictions, supra} note 8, at 302. These elements of local governments, known as Public Housing Authorities or “PHAs,” continue to own and operate public housing. For the sake of limiting acronyms, this Article will refer to PHAs as “local governments” throughout.

\textsuperscript{11} Von Hoffman, \textit{Contradictions, supra} note 8, at 311. Many of the initial tenants were “nuclear families who had fallen on hard times during the Depression.” Charles L. Edson, \textit{Affordable Housing: An Intimate History}, in \textit{THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT} 5 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011).

\textsuperscript{12} Marcuse, \textit{supra} note 9, at 27. Upper income limits were established to ensure that the public housing program did not compete with the private market. Von Hoffman, \textit{Contradictions, supra} note 8, at 302.

\textsuperscript{13} Marcuse, \textit{supra} note 9, at 27.

\textsuperscript{14} See generally J.S. FUERST, WHEN PUBLIC HOUSING WAS PARADISE: BUILDING COMMUNITY IN CHICAGO (2003).

\textsuperscript{15} The Housing Act of 1949 began to shift public housing’s focus from middle-income families to the lowest-income tenants. U.S. DEP’T OF HOUS. & URBAN DEV., REPORT TO CONGRESS ON ALTERNATIVE METHODS FOR FUNDING PUBLIC HOUSING MODERNIZATION I-5 (April 1990) [hereinafter HUD FUNDING FOR PUBLIC HOUSING MODERNIZATION REPORT]; Grogan & Proscio, \textit{supra} note 8, at 12 (“The Housing Act of 1949 transformed public housing from a mainstream support for the temporarily down-and-out into a slum-improvement program, where residents of the poorest and most run-down urban neighborhoods . . . could escape the squalor of tenement life and live decently and low rents.”); Von Hoffman, \textit{Contradictions, supra} note 8, at 310; Von Hoffman, \textit{High Ambitions, supra} note 9, at 436; HUD FUNDING FOR PUBLIC HOUSING MODERNIZATION REPORT, \textit{supra} at I-5.
\end{flushright}
tenants to move out of public housing.16 By 1962, nearly half of public housing residents were dependent on some form of public assistance, up from twenty-nine percent in 1952.17

Increasing numbers of low-income residents were often unable to afford public housing rent.18 As a result, Congress passed the Brooke Amendment to the Housing and Urban Development Act of 1969, which limited tenant rents to twenty-five percent of household income (later increased to thirty percent).19 The amendment significantly reduced the rent burden for many public housing tenants and ensured that public housing would be affordable for the lowest-income renters.20

The Brooke Amendment marked the first time public housing was dependent on the federal government for ongoing funding.21 Because the

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16 Upwardly mobile tenants were increasingly drawn out of the public housing program as FHA mortgage insurance programs made homeownership more attainable for the middle class. HUD FUNDING FOR PUBLIC HOUSING MODERNIZATION REPORT, supra note 15, at I-5. Enforcement of upper income limits also forced the highest-income households to move out of public housing. See Von Hoffman, High Ambitions, supra note 9, at 435. HUD began to require the eviction of over-income tenants in the late 1940s, and this resulted in the removal of many higher-income tenants, including veterans who moved into the properties after returning from service. See Von Hoffman, Contradictions, supra note 8, at 316.

17 MAGGIE MCCARTY, CONG. RESEARCH SERV., R41654, INTRODUCTION TO PUBLIC HOUSING 3 (2012).

18 By the late 1960s, many public housing tenants were paying forty to fifty percent of their incomes in rent, and some were paying as much as seventy percent of their income in rent. See Grogan & Proscio, supra note 8, at 14; Cavanaugh, supra note 7, at 234–35; Edson, supra note 11, at 5.


20 Some have pointed to the Brooke Amendment as the tipping point in public housing composition as it provided financial incentives for higher-income tenants to leave and the lowest-income tenants to remain. See D. BRADFORD HUNT, BLUEPRINT FOR DISASTER: THE UNRAVELING OF CHICAGO PUBLIC HOUSING 290–91 (2009) (“[I]ncome-based rents were counterproductive over time. This policy emerged from a progressive impulse to distribute aid based on need. But it concentrated poverty with its economic incentives for the very poor to stay and for the upwardly mobile to leave.”); Grogan & Proscio, supra note 8, at 15.

21 The federal government had begun providing some small-scale operating subsidies in the early 1960s to help fund public housing and began to provide some modernization funds in 1968. See HUD FUNDING FOR PUBLIC HOUSING MODERNIZATION REPORT, supra note 15, at I-5–6.
switch to income-based rents significantly reduced rent revenues, the amendment required Congress to provide an ongoing operating subsidy to bridge the gap between tenant rents and operating costs.22

As of the late 1990s, the federal government is no longer funding or authorizing net new public housing units.23 The government does, however, continue to subsidize existing public housing units. The remaining public housing units are largely dependent on ongoing federal funding sources.

**ii. Current Financing Structure**

Today, there are approximately 1.2 million public housing units in the United States, down from a peak of 1.4 million in the mid-1990s.24 The majority of units are owned and operated by local governments and were constructed in the 1960s and 1970s.25 Until recently, local

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22 See id. at I-5.
governments were not allowed to mortgage or leverage the physical public housing developments. As a result, public housing generally consists of unencumbered rental housing developments.

Public housing has traditionally been limited to three sources of funding: tenant rent revenue, a federal operating subsidy, and federal capital funds. Public housing tenants continue to pay income-based rents; most pay thirty percent of their household income in rent. Tenant rents currently cover only about forty percent of the operating costs of public housing.

The federal government provides operating funds to bridge the gap between the cost of operating public housing and tenant rents, and Congress calculates the amount of operating funds allotted to the public housing program with a formula developed in the mid-1970s. The amount needed to fund public housing operations has ballooned over the decades, from $28 million in 1970 to $1.3 billion in 1984. Public housing currently requires four to five billion dollars per year in operating subsidies.
The federal government also provides funds to address the capital needs of public housing developments, such as upgrades and large repairs to roofs, heating systems, and windows.\textsuperscript{33} Funds for capital needs are currently drawn from the capital fund, a specific public housing appropriations line item. The funds provided for capital improvements are not insubstantial. Between 1977 and 2001, Congress allocated almost forty-six billion dollars in public housing modernization funds.\textsuperscript{34} Congress typically allocates around $2 to $2.5 billion annually for capital improvements.\textsuperscript{35} In the last couple of years, even that amount of funding has been difficult to reach due to budget battles and the “sequester.”\textsuperscript{36}

As will be described in more detail below, federal funding levels have regularly failed to meet the needs of public housing. Congress often

\footnotesize{\textsuperscript{33} The federal government also provides funds for public housing redevelopment through programs such as HOPE VI. See infra Part II.B.ii.1.}

\footnotesize{\textsuperscript{34} Michael A. Stegman, \textit{The Fall and Rise of Public Housing}, \textit{Regulation}, Summer 2002, at 70.}

\footnotesize{\textsuperscript{35} Edson, \textit{supra} note 11, at 6. Some local governments are able to increase the impact of the funding provided by leveraging their capital fund; by mid-2010, over $3 billion in additional funds was leveraged. McCARTY, \textit{supra} note 17, at 35. This leveraging program, known as the Capital Fund Financing Program, permits borrowing money from private lenders by pledging a future portion of capital fund allocations toward debt service. See \textit{id}. Although a potentially useful source of additional capital funds, only a portion of the existing capital fund can be leveraged and thus its ultimate leveraging potential is limited.}

\footnotesize{\textsuperscript{36} In 2012, $195 million was appropriated for the public housing capital fund, and local governments were expected to use reserves to make up the difference. U.S. DEP’T HOUS. & URBAN DEV., FY 2013 BUDGET: CONGRESSIONAL JUSTIFICATION, PUBLIC HOUSING CAPITAL FUND, at I-1 (2012); MAGGIE McCARTY & DAVID RANDALL PETERMAN, CONG. RES. SERV., R42578, \textit{Transportation, Housing and Urban Development, and Related Agencies (THUD): FY2013 Appropriations} 13 (Apr. 11, 2013). The budget for HUD programs overall, including public housing, has faced uncertainty due to budget battles and the sequester. MCCARTY & PETERMAN, \textit{supra} at 2–3, 13–14; DOUGLAS RICE, \textit{Sequestration Could Deny Rental Assistance to 140,000 Low-Income Families} 1, 9–10 (2013).}
fails to provide the operating funding levels contemplated by the funding formula, which is intended to determine how much a local government needs to operate a property. Federal funds provided for capital improvements have failed to keep up with the maintenance needs of an aging public housing stock. The most recent study of the unmet capital needs in public housing, published in 2011, found an ongoing capital needs backlog of $25.6 billion.  

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37 Between 2002 and 2010, Congress regularly underfunded public housing operating subsidies by not appropriating sufficient funds. DOUGLAS RICE & BARBARA SARD, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS: NEW RESOURCES REQUIRED TO MEET GROWING NEEDS 15 (2009) [hereinafter RICE & SARD, DECADE OF NEGLECT]; U.S. DEP’T HOUS. & URBAN DEV., FY2011 BUDGET, CONGRESSIONAL JUSTIFICATION FOR ESTIMATES, PUBLIC AND INDIAN HOUSING, PUBLIC HOUSING OPERATING FUND L-7 (2010) (“This Budget would fully fund the Operating Fund for only the second time since 2002. Prior to fiscal year 2010, funding levels have been short of eligibility, greatly affecting service levels.”); CLPHA, Operating Fund History 2000-2009 (2009), http://www.clpha.org/operating_fund_history_2000-2009 (last visited July 11, 2012). See also James G. Stockard, Jr., Public Housing—The Next Sixty Years?, in NEW DIRECTIONS IN URBAN PUBLIC HOUSING, supra note 9, at 243. Before 2003, Congress did sometimes provide less in operating subsidies than required by the formula, but “such prorations were intermittent and generally shallow.” BARBARA SARD & WILL FISCHER, PRESERVING SAFE, HIGH QUALITY PUBLIC HOUSING SHOULD BE A PRIORITY OF FEDERAL HOUSING POLICY 10 (2008). Between 2005 and 2009, local governments only received between 83 and 89 percent of the funds needed to operate public housing. RICE & SARD, DECADE OF NEGLECT, supra at 15; McCARTY, supra note 17, at 8; RICE & SARD, BUDGET NOT SUFFICIENT TO RENEW RENTAL ASSISTANCE, supra note 32, at 5.

38 ABT ASSOCs. 2010, supra note 3, at v-vi. The gap between federal capital funds and the capital needs of public housing has been a problem for decades. In 1990, HUD estimated that there was a $22.3 billion unmet modernization need in the public housing program. HUD FUNDING FOR PUBLIC HOUSING MODERNIZATION REPORT, supra note 15, at ES-5. HUD warned Congress that: “Without full funding, some portion of the existing public housing stock will not be upgraded to basic decent, safe and sanitary condition.” Id. at ES-6. In 1992, the National Commission on Severely Distressed Housing estimated the cost to address the capital improvement needs of the 86,000 severely distressed units alone at $5.6 billion. 1992 FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING, supra note 24, at 15. At the time of the report, there were 1.4 million public housing units nationwide. Id. The Commission defined “severely distressed” public housing by considering a number of factors, including distress of families residing in the development, the serious crime rate in and around the development, the physical state of the housing, and “barriers to managing the environment.” Id. at B-2. By 1998, the capital backlog was estimated at $24.6 billion, with needs continuing to accrue at $2 billion a year. ABT ASSOC. INC., CAPITAL NEEDS OF THE PUBLIC HOUSING STOCK IN 1998, at 2–3 (2000) [hereinafter ABT ASSOCs. 2000].
The current public housing system operates quite simply: local governments own and operate the properties, low-income tenants pay income-based rents, and the federal government provides annual allocations of operating and capital funds through the budget appropriations. While simple, the public housing program’s reliance on federal appropriations for survival has significantly hindered it.

B. WHAT IS RAD?

The Rental Assistance Demonstration (RAD) program is the result of several years of attempts by the Obama administration to allow public housing to access alternate sources of capital. The proposal, first put forth in the 2011 federal budget, went through several iterations and name changes, but all embraced the private market as the solution to public housing’s capitalization woes.39 RAD was ultimately adopted in the 2012 budget as a pilot program expected to reach 30,000 units. HUD began to accept applications for the program in the fall of 2012.

RAD is intended to address the capital needs backlog and preserve public housing as a long-term affordable housing resource by using public housing developments as real estate assets. In its simplest form, it would allow public housing to be mortgaged or used as collateral so

39 The Obama Administration’s leveraging plan was first proposed in the FY 2011 budget, where it was called the Transforming Rental Assistance (TRA) plan. See U.S. DEP’T HOUS. & URBAN DEV., INVESTING IN PEOPLE AND PLACES FY 2011 BUDGET 16 (2010), available at http://portal.hud.gov/hudportal/HUD?src=/fy2011budget. The budget included several sweeping proposals, including streamlining the thirteen existing federal subsidy programs. Id. at 15–16. The TRA piece included a request for $350 million to address the joint problems of “an old physical stock with a backlog of unmet capital needs” and the “isolation of the [public housing] program from market forces” that lead to inefficiencies. Id. at 16. TRA was framed as a first step in a multi-year effort to transform the public housing program. Id. TRA would authorize conversion of public housing to a long-term funding contract and permit the leveraging of public housing developments to obtain private capital. Id. TRA was renamed the Preserving, Enhancing, and Transforming Rental Assistance (PETRA) program when HUD released proposed legislation in May of 2010. See Preservation, Enhancement, and Transformation of Rental Assistance Act of 2010, H.R. 6468, 111th Cong. (2010). The legislation provided significantly more detail but remained committed to the goals of permitting public housing to convert to a term subsidy stream and allowing leveraging of public housing developments to finance capital improvements. Id.; see NAT’L COUNCIL OF STATE HOUS. AGENCIES, THE PRESERVATION, ENHANCEMENT, AND TRANSFORMATION OF RENTAL ASSISTANCE ACT OF 2010: SECTION-BY-SECTION SUMMARY (2010). For additional information on earlier iterations of the proposal, see Peter W. Salsich, Jr., Does America Need Public Housing?, 19 GEO. MASON L. REV. 689, 712–18 (2012).
local governments could access “private debt and equity to address immediate and long-term capital needs” of public housing.40

RAD would change public housing in two key ways. First, public housing operating funds—the funds that fill the gap between tenant rents and the cost to operate a property—would convert from a funding formula dependent on annual appropriations to a long-term federal subsidy contract.41 Second, local governments could access alternate sources of capital—including private capital—by treating the public housing developments themselves as collateral.42

i. Conversion to a Long-Term Subsidy Contract

Properties approved for participation in RAD43 will receive a long-term funding contract to replace the current appropriations-based funding formula.44 The funding stream for a particular property will convert into one of two kinds of long-term project-based subsidy streams: the Project-Based Voucher Program (“PBV”) or Project-Based Section 8 Rental Assistance (“PBRA”).45 Properties converted to PBV would have an initial fifteen-year subsidy contract, and those converted to PBRA would have an initial contract term of twenty years.46 The contracts are intended to continue beyond the initial term; HUD is required to offer, and the property owner is required to accept, renewals of the subsidy contract.47 Similar to the existing public housing program, tenants of covered units will typically pay income-based rents, and the

40 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, at 2–3. The program also applies to Moderate Rehabilitation projects and some Rent Supplement properties. For ease of analysis, this Article will focus on the provisions pertinent to public housing developments.
41 Id. § 1.2.
42 Id.
43 Under RAD, local governments will apply to HUD to include particular public housing developments in the pilot program. Id.
44 Id.
45 Id.
46 Id. §§ 1.2, 1.6(B)(1), 1.7(A)(1). Properties converting to PBV could have an initial subsidy contract of twenty years “upon approval of the administering voucher agency.” Id. § 1.2. As is typical in federally subsidized affordable housing, the subsidy contracts and any initial renewals will be “subject to annual appropriations.” Id.
47 Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, tit. II, 125 Stat. 672, 675 (2011) (“[U]pon expiration of the initial contract and each renewal contract, the Secretary shall offer and the owner of the property shall accept renewal of the contract . . . .”); REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, §§ 1.6(B)(2), 1.7(A)(2).
subsidy contract will cover the difference between the tenant’s portion and the actual rent of the unit.\textsuperscript{48}

The intent of the conversion to a long-term subsidy contract is twofold. First, a subsidy contract is a more stable form of funding. Second, this stability will make public housing more attractive to potential investors. The next step in RAD is to treat public housing developments as real estate assets that can be used as collateral to secure the investment.

\textit{ii. Mortgaging Public Housing}

RAD contemplates that physical public housing developments may serve as leverage or collateral to secure private funding.\textsuperscript{49} RAD is based on the perception of public housing developments as untapped real estate assets. As the federal government long forbade mortgaging public housing,\textsuperscript{50} the current public housing stock largely consists of unencumbered properties. The value of public housing as real estate is estimated at between $90 and $145 billion.\textsuperscript{51}

It may be useful to provide an example of how HUD anticipates RAD will operate. HUD illustrated the proposal as follows: A 100-unit public housing development, built in 1975, requires significant repairs.\textsuperscript{52} The property converts its funding stream to long-term subsidy contract.\textsuperscript{53} The local government then obtains a private mortgage of $1.6 million, using the development as collateral.\textsuperscript{54} The loan proceeds are used to make necessary repairs.\textsuperscript{55} The local government repays the private loan over the loan term, using rent revenues and proceeds from the long-term subsidy contract.\textsuperscript{56}

\begin{footnotesize}
\begin{enumerate}
\item See NAT’L HOUS. LAW PROJECT, \textit{supra} note 28, §§ 1.43–1.44, 1.50–1.51.
\item \textit{Id.} § 1.4. This funding could include a combination of private and public funds.
\item See \textit{supra} note 26.
\item U.S. DEP’T HOUS. \\& URBAN DEV., \textsc{Preserving Public Housing Through Conversion to Long-Term Section 8 Housing Assistance Payment (HAP) Contracts: Two Recapitalization Examples Under HUD’s Rental Assistance Demonstration (RAD), available at http://www.a2gov.org/services/OtherServices/Housing/Documents/HUD%20summary%20of%20RAD%20program%20impact.pdf.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
iii. Why RAD Scares Affordable-Housing Advocates

The idea of mortgaging public housing to fill gaps in federal funding was not universally acclaimed when first proposed. I count myself among those affordable-housing advocates who had serious concerns about the impact of the proposal on the long-term viability of public housing. Those who have spent careers fighting to preserve affordable housing units see—a variety of ways in which a program like this could result in a loss of valuable public housing. While all agree that public housing is in need of additional funds to address the capital needs backlog, RAD raised serious concerns. Primary among those concerns was that RAD would expose public housing to the possibility of foreclosure and could result in private ownership and the possible loss of public housing units.

The foreclosure issue came to a head at a 2010 hearing before the Committee on Financial Services in the House of Representatives on an early iteration of RAD. Committee members bombarded HUD with questions about the practical and legal implications for a public housing development in the event of foreclosure, the implications of private ownership, and the potential impact on tenants and the long-term survival of public housing. Others questioned whether issues of future preservation could be entrusted to HUD’s discretion. After the hearing, HUD engaged in a public relations campaign designed to calm fears. A


58 See H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 1–4, 364. (statement of Rep. Frank) (“[I]f the price of accessing private capital is to put public ownership [of public housing] at risk, that may be too high a price.”); Id. at 9 (statement of Rep. Maxine Waters, Chairwoman, H. Subcomm. on Hous. & Cmty. Opportunity) (“I consider this experiment to be very dangerous . . . I am not about to be a part of privatizing public housing.”).

59 Id. at 12 (statement of Rep. Watts) (“I tell you I wouldn’t have had a hill of beans worth of confidence in the last Secretary of HUD in the last Administration making those same decisions.”). At the conclusion of the hearing, it seemed unlikely HUD’s proposal could overcome opposition. See Frank Says He Can’t Support HUD’s Transforming Rental Assistance Plan Because of Risk to Public Housing, 38 NO. CD-11 HDR CURRENT DEV. 2 (2010).
series of articles and opinion pieces were released to sell HUD’s proposal as the last, best chance to salvage public housing.60

To further alleviate concerns about the possibility of foreclosure, RAD imposed a variety of protections.61 Public housing cannot be subjected to certain high-risk loans, such as variable interest rate loans and some balloon terms.62 Mortgage liens are required to be subordinate to, and subject to, a HUD Use Agreement, which dictates that the property remain affordable housing.63

It is notable that this use of public housing as collateral or leverage could also result in a transfer of ownership to a non-governmental, and possibly for-profit, owner even absent foreclosure. Some financing deals, including those involving the Low-Income Housing Tax Credit (LIHTC) program, will require that ownership of the property be transferred from the local government to another entity.64 In the case of LIHTC, that new owner would be a for-profit entity. RAD will permit these ownership transfers, so long as the local government preserves its interest in the property in a way that satisfies HUD.65

60 Secretary Donovan asserted, “If we fail to act now, we will lose these irreplaceable [public housing] resources forever,” and others at HUD echoed that sentiment. Shaun Donovan, Making Public Housing Work for Families, HUFFINGTON POST, May 26, 2010, http://www.huffingtonpost.com/shaun-donovan/making-public-housing-wor_b_590407.html; Sandra B. Henriquez, Saving Public Housing, HUFFINGTON POST, June 8, 2010, http://www.huffingtonpost.com/sandra-brooks-henriquez/saving-public-housing_b_604663.html. Some affordable housing advocates stood behind the administration’s proposal, arguing, “While we are arguing over the potential loss of public housing someday in the future if one part of PETRA were to become law, public housing agencies are already demolishing and selling off public housing under current law.” Sheila Crowley, Status Quo Won’t Save Public Housing, HUFFINGTON POST, June 15, 2010, http://www.huffingtonpost.com/sheila-crowley/status-quo-wont-save-publ_b_613208.html. Secretary Donovan repeatedly stressed that the intent of the program was to save the public housing program: “Barack Obama didn’t come to Washington to let your homes be sold off to the highest bidder—or let them decay so badly that they won’t be there for future generations.” Shaun Donovan, Sec’y, Dep’t of Hous. & Urban Dev., Remarks at the Nat’l Low Income Housing Coalition 2011 Housing Policy Conference (Mar. 28, 2011), available at http://portal.hud.gov/hudportal/HUD?src=/press/speeches_remarks_statements/2011/Speech_03282011.

61 For a more detailed description, see infra Part V.c.2.

62 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.4(B)(1).

63 Id.

64 See, e.g., Rochelle E. Lento, Federal Sources of Financing, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 217–21 (Tim Iglesias & Rochelle E. Lento eds., 2006).

65 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, §§ 1.6(B)(3), 1.7(A)(3).
HUD expressed a preference for public ownership of public housing developments, though not in all circumstances. HUD will typically require that while the subsidy contract is in place, the converted public housing property be owned by “a public or nonprofit entity.”

HUD may permit transfers to other types of ownership, however, if “in its sole discretion” it believes it necessary due to foreclosure, bankruptcy, or a termination or transfer of the subsidy contract.

RAD also attempts to calm the fears of housing advocates and tenants by preserving many of the tenant protections and rights held by current public housing tenants. For instance, existing tenants cannot be rescreened for eligibility when the property is converted. Any tenants required to move out of the property to facilitate rehabilitation would have a “right to return.” RAD also provides a new choice mobility right to public housing tenants in converted properties. Unlike the current public housing program that does not provide tenants any mechanism to relocate (other than to another public housing development), the new program would provide residents in converted properties some ability to move to a private-market unit with the aid of a tenant-based voucher.

RAD is a complicated program. The concept represents a significant modification of public housing funding. It pulls away from the traditional public housing model by treating public housing developments as untapped real estate assets that can be mortgaged to fill long-term gaps in federal funding.

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66 Id.
67 Id.
68 Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, tit. II, 125 Stat. 673, 674 (2011) (“[T]enants of such properties . . . shall, at a minimum, maintain the same rights under such conversion.”).
69 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, §§ 1.6(C)(1), 1.7(B)(1).
70 Id. §§ 1.6(C)(2), 1.7(B)(2). It is notable that the proposed guidance contemplated a “first right to return,” an arguably more specific right that that contained in the final guidance. See U.S. DEP’T OF HOUS. & URBAN DEV., PIH-2012-18 (HA), RENTAL ASSISTANCE DEMONSTRATION—PARTIAL IMPLEMENTATION AND REQUEST FOR COMMENTS §§ 1.7(C)(2), 1.8(B)(2) (2012).
71 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.7(C)(5). The details of the choice option are complex, and it is not necessary to delve into great detail for purposes of this Article. Generally, however, tenants will be permitted to obtain a tenant-based voucher to enable them move off of the property twenty-four months after moving onto the property or conversion, subject to some caps on the number of vouchers that must be provided. See, e.g., id.; Family Right to Move, 24 C.F.R. § 983.260 (2005).
II. IS MORTGAGING PUBLIC HOUSING A NATURAL PROGRESSION IN THE PRIVATIZATION OF FEDERAL HOUSING POLICY?

At the same time, RAD is, in many ways, a natural next step in federal housing policy. The federal government has come to rely heavily on private owners and investors to provide the country’s affordable housing stock. The following section will illustrate the ways in which current federal housing programs no longer reflect the public housing model of government-owned, operated, and funded housing. Public housing itself has weathered several privatization attempts, and it is perhaps only natural that the government is looking to outside capital to bring needed funds into the program.

A. RELIANCE ON PRIVATE OWNERS AND INVESTORS

In the last fifty years, federal affordable housing policy has shifted significantly. In the 1970s, affordable housing policy began to move away from the public housing model toward reliance on private actors to provide the affordable housing stock. Though the government continued to subsidize rents for low-income tenants, the Project-Based Section 8 and voucher programs rely on privately owned housing. Today, the government rarely engages in the direct provision of affordable housing, preferring to incentivize private actors to develop housing through federal tax credits. A brief discussion of each of the programs involved will help to illustrate this sea change in federal affordable housing policy.

i. Privately Owned Housing

1. Project-Based Section 8

The Project-Based Section 8 program, enacted in 1974, placed long-term federal subsidies on privately owned and operated housing developments.72 Private actors developed and owned rental housing,

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72 Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. § 5301 (West, Westlaw through P.L. 113-31 approved Aug. 9, 2013)). The creation of the Section 8 program followed the 1960s development of several other programs that provided federally funded rental housing via privately owned rentals, including Section 236 (low-income families and seniors), Section 202 (elderly), and Section 221(d)(3) (families with incomes above the public housing limits). See McCarty, supra note 17, at 4. For the remainder of the 1970s, the focus of federal housing policy was increasingly on Section 8 and the number of Section 8 units put under contract dwarfed the number of public housing units created in the same period. “Public housing averaged fewer than 37,000 reservations for new units of public housing per year between 1975 and 1979, compared to an average of more than 275,000 reservations for new Section 8 assisted units per year over the same period.” Id. at 6. See also Von Hoffman, Contradictions, supra note 8, at 320.
often with the aid of federally subsidized mortgages.\textsuperscript{73} The federal government then provided term subsidy contracts to make the properties affordable to low-income renters. The contracts had initial terms of five to twenty years and were regularly renewed.\textsuperscript{74} The contract subsidized a particular property so that units in the property remained affordable as long as the contract was in place. Similar to public housing, the subsidy contract bridged the gap between income-based rents and operating costs. Project-Based Section 8 thus continued to provide affordable housing to the lowest-income tenants, but relied on a privately owned rental housing stock.

The creation of new Project-Based Section 8 developments was short-lived; Congress repealed HUD’s authorization to enter into new subsidy contracts with private owners in 1983.\textsuperscript{75} Much like the current public housing program, Project-Based Section 8 is now a preservation-only program.\textsuperscript{76} HUD continues to fund the existing subsidy contracts and offer contract renewals, but does not offer contracts on new properties.

2. Tenant-Based Vouchers

The federal government took reliance on the private market a step further with the tenant-based voucher program.\textsuperscript{77} Also enacted in 1974, tenant-based vouchers have become the primary source of federal housing subsidy to date, serving more than two million low-income

\textsuperscript{73} Project-based Section 8 properties were often also developed and/or purchased with the assistance of a federally subsidized mortgage, in which an owner paid a low interest rate in exchange for an agreement to operate the property as affordable housing for a set term. \textsc{Nat’l Hous. Law Project}, supra note 28, \S 1.51.

\textsuperscript{74} \textit{Id.} The first project-based Section 8 subsidy contracts had terms of five years, with longer-term renewals; properties funded after 1979 received initial twenty-year subsidy contracts. \textit{Id.}


\textsuperscript{76} See Letter from Hous. Justice Network to U.S. Sec’y of Hous. & Urban Dev. Shaun Donovan, \textit{supra} note 57, at 158 (referencing the “now decades-long struggle to protect the privately-owned HUD-assisted stock from attrition . . .”).

\textsuperscript{77} The program is currently known as the Housing Choice Voucher Program (HCVP). See \textsc{Nat’l Low Income Hous. Coal., 2012 Advocates’ Guide To Housing And Community Development Policy} 103–04 (2012), available at http://nlihc.org/sites/default/files/2012-Advocates-Guide_0.pdf. To avoid drowning the reader in acronyms—an occupational hazard in federally subsidized housing—this Article will simply refer to the voucher program or tenant-based voucher program.
households. The voucher program is a demand-side program; tenants receive a rental voucher that they can use to rent an apartment on the private market. Similar to the public housing and Project-Based Section 8 programs, tenants pay income-based rents, and the program serves some of the lowest-income renters.

ii. Use of Tax Credits

The latest step in the privatization of federal affordable housing policy is the Low-Income Housing Tax Credit (LIHTC) program. Currently the only significant federal affordable housing production program, LIHTC has helped develop 1.67 million units by providing tax incentives to spur private actors to develop affordable housing. A for-profit investor provides capital to help develop affordable housing and obtains the benefit of federal tax credits in exchange. The logistics of the program are complicated and enmeshed in the tax code, but a simplified explanation is that a for-profit entity develops and owns a majority share in an affordable housing property and reaps tax benefits for several years after development. The for-profit entity must maintain the property as affordable housing for fifteen to thirty years.

LIHTC is notable in two main respects. First, it marks yet another step away from direct government involvement and toward utilizing and incentivizing the private market to provide affordable housing. Second, it represents a move away from providing housing affordable to the lowest-income renters. Properties developed with LIHTC typically have rents set at sixty percent of area median income. They are “affordable,” but tenants pay a set, rather than income-based, rent. As a result, LIHTC units are typically affordable to the lowest-income renters only if they are combined with another ongoing rental subsidy, such as a tenant-based voucher.

78 U.S. DEP’T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS 2009: REPORT TO CONGRESS 1, 59 (2011) [hereinafter WORST CASE HOUSING NEEDS].
79 See NAT’L LOW INCOME HOUS. COAL., supra note 77, at 103–04.
80 MCCLURE, supra note 1, at 1.
81 NAT’L LOW INCOME HOUS. COAL., supra note 77, at 121–23; Lento, supra note 64, at 217–19.
82 See, e.g., Lento, supra note 64, at 217–21.
83 In order to take advantage of the tax credit, the ownership entity must pay taxes. See id. at 231–34. Ownership of an LIHTC property is typically structured so that the for-profit investor has a ninety-nine percent ownership interest in the property. Id. at 232. The original “owner”—often a non-profit—retains a minimal ownership interest but operates as general manager. Id. at 233.
84 Id. at 221.
85 LIHTCs are often used in the renovation or rehabilitation of existing affordable housing properties, and many thus receive the benefit of an existing project-based subsidy. The program itself, however, neither requires nor
B. PRIVATIZATION TRENDS IN PUBLIC HOUSING

Given the increased reliance on subsidized private housing, public housing—housing owned and operated by the government—has become the outlier. However, it too has been vulnerable to the shift towards privatization.

i. Attempts to Privatize Public Housing

Public housing weathered several attempts from politicians of both parties to either sell the properties to private owners (or tenants) or convert to a tenant-based voucher program.

Pushes to privatize public housing by selling the units began as early as the 1960s. Proponents of selling public housing to tenants expected that homeownership would give residents increased stability and status.86 No less important was the fact that each unit converted to homeownership would reduce the cost to the federal government of supporting public housing.87 Small-scale programs intended to transfer ownership of public housing units to tenants were implemented in the 1960s and 1970s.88 But the idea of transferring units to tenants as a means of extracting the government from the public housing business provides any rental subsidy. Many low-income tenants are able to afford to live in an LIHTC property only if they already hold a tenant-based voucher. See Nat’l Low Income Hous. Coal., supra note 77, at 121–22.

86 HUD CIRCULAR, A HOMEOWNERSHIP PROGRAM FOR LOW-INCOME FAMILIES, 1 (Dec. 17, 1968) (on file with author) ("Through this plan, low-income persons are able to experience the pride of homeownership and the sense of responsibility and status which is associated with such ownership."); Jane Lehman, Bush Administration Accused of Leaving Rental Aid for Poor ‘Out in the Cold’, WASH. POST., Apr. 7, 1990, at F3 (quoting U.S. Dep’t of Hous. & Urban Dev. Jack Kemp as supporting a public housing ownership plan because "(t)he most universal aspiration of people is to have that white picket fence, that equity in the system.").

87 Peter J. Ferrara, The Department of Housing and Urban Development, in MANDATE FOR LEADERSHIP II: CONTINUING THE CONSERVATIVE REVOLUTION 116 (Stuart M. Butler et al. eds., 1984) ("The government would benefit financially since it would no longer be responsible for operating and maintenance subsidies for sold buildings.").

88 The first homeownership program, Turnkey III, was enacted administratively by HUD in 1968. HUD CIRCULAR, supra note 85. Households would start as tenants and convert to home-buyer status after meeting a goal of putting $200 into a reserve fund. Id. at 2. The tenants/homeowners would pay twenty percent of their income toward the purchase of the home, and they would be assisted with ongoing federal payments. Id. at 5–6. It was anticipated that the tenant/homeowners would take title to the home after twenty-five years. Id. at 10. A similar program, known as Section 5(h), was enacted in the mid-1970s. See Low Rent Housing Homeownership Opportunities, 24 C.F.R. § 904 (2011) (originally enacted as 24 C.F.R. Part 1270, 39 Fed. Reg. 10964 (Mar. 22, 1974)).
did not take hold until the 1980s. The Reagan administration’s 1982 Commission on Housing proposed sweeping changes to public housing, such as selling the properties to third parties and permitting tenants to purchase individual units.  

Homeownership proponents made some progress, but the programs were typically short-lived. HUD adopted a Public Housing Homeownership Demonstration in 1985 that proposed to sell more than 1300 units to public housing tenants. The program failed to meet its

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89 President’s Comm’n on Hous., The Report of the President’s Commission on Housing 39 (1982). The report found operating expenses increased 217 percent between 1969 (the enactment of income-based rents) and 1980. Id. at 32. It also asserted public housing “has provided housing of last resort for people with special difficulty locating adequate, affordable housing in the private market, particularly large families, single-parent families, and minority families.” Id. at 35. A report by the Heritage Foundation at the time, known as the Mandate for Leadership II, proposed that the federal government get out of the public housing business altogether. See Ferrara, supra note 87, at 113–17. A 1988 report by the President’s Commission on Privatization included similar recommendations, including transferring public housing units—and in some cases entire developments—to tenants. See President’s Comm’n on Privatization, Privatization: Toward More Effective Government xv-xvi (1988) [hereinafter Privatization].


goal; by 1990, only a quarter of the expected units had been sold.\textsuperscript{92} Of the tenants who purchased, nearly a third reported that the mortgage payments were “causing a strain on their budgets,” and ten percent were in arrears within a few years.\textsuperscript{93} Despite Congress’s and HUD’s best efforts, the aspirations of tenant purchase programs in public housing were simply no match for the inability of the lowest-income renters to support mortgage payments.\textsuperscript{94}

In the mid-1990s, the Clinton administration embraced a proposal to convert public housing to tenant-based vouchers. The idea, proposed as early as the 1970s\textsuperscript{95} and a common refrain through the Reagan years, gained traction when the Clinton administration was forced to take drastic action in the face of calls to abolish HUD.\textsuperscript{96} The Clinton administration advanced vouchers in a series of policy papers, the 1994 HUD Reinvention Blueprint and the subsequent 1995 HUD’s Reinvention: From Blueprint to Action, which embraced the conservative philosophy.\textsuperscript{97}

The essence of the Reinvention proposals was to convert public housing from a supply-side to a demand-side program.\textsuperscript{98} Existing tenants would receive vouchers. If they used their vouchers in their current public housing units, then the local government would receive funds from the federal government—through the voucher—to help subsidize

\begin{itemize}
  \item \textsuperscript{92} Id. at xii.
  \item \textsuperscript{93} Id. at xiii.
  \item \textsuperscript{94} As Mel Martinez, HUD Secretary under George W. Bush, concluded, “While we consider homeownership to be an important goal, we recognize that it is not an option for everyone . . . .” HUD’s Fiscal Year 2003 Budget and Legislative Proposals: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 107th Cong. (2002) (statement of Mel Martinez, Sec’y of Hous. and Urban Dev.) [hereinafter S. Comm. on Banking, Hous. & Urban Affairs, HUD’s Fiscal Year 2003 Budget and Legislative Proposals].
  \item \textsuperscript{95} RICHARD F. MUTH, PUBLIC HOUSING: AN ECONOMIC EVALUATION 47–51 (1973) (arguing that a rental certificate or voucher system would be more effective than the public housing system).
  \item \textsuperscript{96} See Stephen Barr, Combatants Square Off Over Survival of HUD, WASH. POST, June 30, 1995, at A21; Catherine S. Manegold, Secretary Proposes Reshaping HUD to Save It, N.Y. TIMES, Mar. 21, 1995, at 17. The idea of abolishing HUD had been floated for some time before it gained political traction. See, e.g., Abolish HUD, NEW REPUBLIC, Aug. 21, 1989, at 7–8.
  \item \textsuperscript{97} U.S. DEP’T OF HOUS. & URBAN DEV., HUD’S REINVENTION: FROM BLUEPRINT TO ACTION 15–16 (1995) [hereinafter HUD’S REINVENTION]. The proposal would also require the demolition of severely distressed public housing units, as well as those developments “that are so poorly located that they have no hope of charging market rents high enough to cover costs even after the development is rehabilitated.” Id. at 16.
\end{itemize}
the unit. If, however, tenants elected to move and use their vouchers in private apartments, the local government would not receive any funds for that unit. Local governments would be expected to compete for tenants on the private market and rent to a combination of public housing and market tenants. Proponents believed market competition would force local governments to adequately maintain their properties, continue to provide affordable housing for low-income tenants, and save the federal government money.

Ultimately, Congress did not abolish HUD. Nor did it adopt most of the Clinton Administration’s Blueprint. Congress never fully embraced the idea of vouchering out public housing. Despite bold rhetoric and drastic proposals, public housing was left mostly unchanged. The idea of providing vouchers to tenants in lieu of project-based subsidized housing, however, continues to attract adherents at both the national and local level. It has become common for jurisdictions seeking to get out of the public housing business to try to convert that housing to tenant-based vouchers.

99 HUD’s REINVENTION, supra note 97, at 18.
100 Then-HUD Secretary Cisneros estimated the plan would save the government $60 billion over five years. See Manegold, supra note 96, at 17. That claim was controversial, and others argued the Reinvention plan would actually cost significantly more than the existing public housing program. See Curhan, supra note 98, at 245–49. The proposal also assumed an availability of affordable units on the private market that tenants could rent with their certificates, an assumption questioned by analysts. See id. at 251–52.
103 Although some analysts at the time argued that the political wrangling of the mid-1990s might “mark the beginning of the end for public housing in both theory and practice,” id. at 35, that prediction has not proved accurate.
Using the Private Market to Finance Public Housing

The trend towards integrating the private market into public housing has been driven, in large part, by the recognition that federal funds have not been available at the levels needed. In 1992, the National Commission on Severely Distressed Public Housing first recommended that the government allow public-private partnerships to leverage the funds needed to rehabilitate severely distressed public housing properties. Since that recommendation, the government has been exploring alternative ways to utilize the private market, including well-known private-public partnership programs, such as HOPE VI. RAD, which permits local governments to mortgage the public housing developments themselves, extends this process a step further.

1. Public-Private Partnerships

The HOPE VI program, authorized in 1992 and funded in 1993, was designed to facilitate the transformation of distressed public housing developments into mixed-income communities. HUD encouraged the use of HOPE VI funds as leverage to draw private capital into redevelopments.

A series of actions in the 1990s further paved the way for private investment in public housing. In 1994, HUD’s general counsel concluded there was no statutory bar to a private actor owning, operating, and receiving federal funds for a public housing development. A 1998 statute, the Quality Housing and Work

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106 1992 Final Report of the National Commission on Severely Distressed Public Housing, supra note 24, at 104–05, 130–32. Under the Commission’s recommendation, existing public housing—but not the underlying land—could be sold to a limited partnership. Id. at 132. The partnership would utilize available funding sources, including tax credits and private financing, to rehabilitate the property. Id. The partnership would then lease the development back (retaining ownership of the buildings for the time necessary to obtain the benefits from the tax credits). Id. At the conclusion of the tax credit holding period, the property would be sold either to the local government or to the residents. Id.

107 For more information on the various ways public housing policy has focused on the private sector, see Salsich, supra note 39, at 700–10.


109 Id. at 17 (“As HOPE VI evolved, the financing picture shifted substantially, with the private sector taking on an unprecedented role.”). HUD also utilized FHA insurance “to stimulate private lending in neighborhoods that had not witnessed new investment for decades.” Id.

Responsibility Act (QHWRA) encouraged local governments to enter into public-private partnerships to redevelop public housing into mixed-income communities. Local governments were authorized to leverage a portion of federal appropriations to secure private investment.

Results from these partnerships are mixed. More than six billion dollars in HOPE VI grants were awarded between 1993 and 2010. HOPE VI is credited with redeveloping almost 100,000 “severely distressed” public housing units. A number of struggling public housing developments were redeveloped into vibrant, mixed-income communities. Local governments were able to leverage a significant amount of private capital, with some estimates showing that $1.85 were leveraged for every dollar in federal HOPE VI funds.

The opinion noted, however, that such relationships were a “significant departure from anything that the Department has approved in the past.” Id. at 9-62, 9-63.


U.S. DEP’T OF HOUS. & URBAN DEV., PRESS RELEASE NO. 10-112, HUD AWARDS SIX HOUSING AUTHORITIES $113.6 MILLION TO REVITALIZE PUBLIC HOUSING, TRANSFORM SURROUNDING NEIGHBORHOOD (June 1, 2010).

See supra note 108, at 24. It is unclear what portion of the leveraged funds was from private capital, as opposed to other government funding sources. Id.
The impact on the tenants, however, is less clear. Proponents argue that tenants benefitted from redeveloped communities, less-concentrated poverty, and reduced crime, and that even displaced tenants reaped the benefit of a voucher. HOPE VI did not, however, require that each unit of existing public housing be replaced in the redevelopment. Opponents argue that tenants were displaced when demolished units were not replaced or they were unable to return when properties implemented stringent rescreening criteria.

Specific programs and initiatives have experienced ebbs and flows over the past decade. The HOPE VI program, for example, has been replaced by a similar program known as Choice Neighborhoods. The takeaway from the last decade, however, is that the trend toward integrating the private market into public housing is significant and unlikely to abate.

2. Early Attempts to Mortgage Public Housing

The idea of mortgaging public housing to fill gaps in federal funding is not new. The George W. Bush administration pushed an almost identical proposal, known as the Public Housing Reinvestment Initiative (PHRI) in the 2003 and 2004 budget cycles. As with RAD, approved public housing developments would convert from traditional public housing funding to a long-term subsidy contract, which was deemed

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116 Much has been written about the impact the HOPE VI program has had on public housing residents. See, e.g., Susan D. Bennett, Constructing the Social Impact Statement to Measure the Full Cost to Public Housing Tenants of Urban Renewal, in AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 129 (Nestor M. Davidson & Robin Paul Mallow eds., 2009).

117 POPKIN ET AL., supra note 108, at 47–49. Some studies suggest displaced tenants “ended up in somewhat better neighborhoods.” Id. at 29.

118 AMERICA’S RENTAL HOUSING: MEETING CHALLENGES, BUILDING ON OPPORTUNITIES, supra note 114, at 39. This is commonly referred to as “one for one replacement.”


121 As one commentator noted, “The trend toward private-public partnerships . . . seems unstoppable.” Edson, supra note 11, at 7.

more likely to attract investors. 123 Properties would be leveraged or mortgaged on the private market, with the expectation that local governments would be able to obtain sufficient funds to address the backlog in capital needs. 124

Three primary factors drove PHRI. First was the recognition that the federal government was not going to provide sufficient funds to address the backlog in capital needs. 125 Second was a belief that public housing developments, viewed as real estate, were significant untapped assets. 126 And third, that exposing public housing to the private market would result in greater market discipline and efficient operations. 127

123 See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004—APPENDIX 521 (2003) (proposed addition of § 9(o)(1) to the United States Housing Act of 1937, ch. 896, 50 Stat. 888); S. Comm. on Banking, Hous. & Urban Affairs, HUD’s Fiscal Year 2003 Budget and Legislative Proposals, supra note 94 (statement of Sen. Reed) (“[N]o financial institution will lend to a public entity based upon appropriations going forward because of the uncertainty in the appropriations process.”); id. (statement of Sec’y Mel Martinez) (“Section 8 has been a very dependable revenue stream . . . [T]he private financing sector is used to funding Section 8 projects.”).

124 Note that both PHRI and RAD incorporate resident choice proposals, which permit public housing tenants to choose to move off of the property with a tenant-based voucher. The choice angle is an important component of both programs, but a detailed analysis of the risks and benefits of that aspect of the program is beyond the scope of this Article.

125 PUBLIC HOUSING REINVESTMENT INITIATIVE, supra note 122, at 1 (“If this Nation is to make substantial and timely progress in improving living conditions for residents, a new approach is necessary that does not rely solely on annual appropriations.”).


127 Revitalizing Public Housing: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Fin. Servs. Comm., 108th Cong. (2003) (statement of Michael Liu, Assistant Sec’y for Public and Indian Hous.) (“PHRI will introduce a market test into public housing investment decisions and give PHAs access to private capital when they adopt the same ‘asset management’ principles that are used in private sector real estate finance and management.”); see also Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations for Fiscal Year 2004: Hearing Before
Congress was skeptical of the new proposal. Some questioned whether banks would invest in public housing, given the history of funding challenges and the unattractive prospect of operating a foreclosed rental property.\textsuperscript{128} The program also raised concerns regarding the preservation of public housing. For instance, the program included only weak foreclosure protections,\textsuperscript{129} exposing the public housing stock to the possibility of a transfer of ownership to a private entity or bank in the case of foreclosure. HUD also had authority to terminate affordability restrictions in the event of foreclosure, which could result in a net loss of affordable housing in the event of a foreclosure.\textsuperscript{130} In response, HUD modified the proposal to guarantee loans up to eighty percent of principal to make the program more attractive to lenders and mitigate the foreclosure risk.\textsuperscript{131} PHRI ultimately succumbed to concerns that it “could result in a loss of public housing units, and would not benefit public housing units with the greatest capital needs,”\textsuperscript{132} and it was rejected by Congress.\textsuperscript{133} The idea remained dormant until the Obama administration resurrected it and, eventually, fashioned it into the RAD program.

III. IS PUBLIC HOUSING REFORM NECESSARY?

It is worth asking if all of this is really necessary. Does the country need to embrace a new scheme to substantially reform the public housing financing structure? Probably. The existing financing structure has resulted in an unsustainable status quo. The country is facing an affordable-housing crisis, and there is a public interest in preserving the finite public housing stock.

\textsuperscript{128} S. Comm. on Banking, Hous. & Urban Affairs, \textit{HUD's Fiscal Year 2003 Budget and Legislative Proposals}, supra note 94 (statement of Sen. Reed) (“I do not know how many financial institutions would like to foreclose and operate public housing with the kind of revenue streams that might be forthcoming from this administration and succeeding administrations.”).


\textsuperscript{130} See \textit{id.} § 208(a)(o)(5); \textit{Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations for Fiscal Year 2004: Hearing Before a Subcomm. of the Comm. on Appropriations, 108th Cong. 17 (2003) (statement of Mel Martinez, Sec’y of Hous. & Urban Dev.).

\textsuperscript{131} See \textit{S. REP. NO. 107-222, at 30 (2002).}

A. The Status Quo Is Unsustainable

Public housing’s heavy dependence on the federal government makes it susceptible to any unexpected drops in federal funding. Additionally, the federal government has for decades failed to adequately fund public housing. As a result, public housing developments are in need of repair, units are disappearing, and local governments are getting out of the public housing business altogether.

i. Insufficient Funding

Congress has regularly failed to meet its obligation to adequately fund public housing. Between 2002 and 2010, Congress regularly underfunded public housing operating subsidies.134 In the latter half of that window, local governments received between only eighty-three and eighty-nine percent of the funds needed to operate public housing.135 Although full operating subsidies were provided in 2010 and 2011, operating funds provided for public housing in fiscal year 2012 were close to one billion dollars less than what was needed under the funding

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134 RICE & SARD, DECADE OF NEGLECT, supra note 37, at 15; U.S. DEP’T OF HOUS. & URBAN DEV., FY2011 BUDGET, CONGRESSIONAL JUSTIFICATION FOR ESTIMATES, PUBLIC AND INDIAN HOUSING, PUBLIC HOUSING OPERATING FUND L-1, L-7 (2010) (“This Budget would fully fund the Operating Fund for only the second time since 2002. . . . Prior to fiscal year 2010, funding levels have been short of eligibility, greatly affecting service levels.”); Operating Fund History 2000-2009, COUNCIL OF LARGE PUB. HOUSING AUTHORITIES, http://www.clpha.org/operating_fund_history_2000-2009 (last visited Jan. 17, 2014); see also Stockard, supra note 37, at 243. Before 2003, Congress did sometimes provide less in operating subsidies than required by the formula, but “such prorations were intermittent and generally shallow.” SARD & FISCHER, supra note 37, at 10.

135 RICE & SARD, DECADE OF NEGLECT, supra note 37, at 15; MCCARTY, supra note 17, at 33.
formula. In 2013, the public housing budget experienced significant uncertainty due to budget battles and the sequester.

The federal government’s failure has had serious negative consequences. In the absence of sufficient funds, local governments faced difficult choices, and many were forced to put off needed repairs or otherwise compromise on issues such as management, security, and capital improvements. The federal government has also failed to meet the capital needs of public housing. Capital funds are intended to facilitate upgrades and large repairs. Though the amounts provided for capital improvements are not insubstantial, they have historically lagged far behind the actual capital needs of public housing. When available funds are insufficient to make capital improvements, public

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136 RICE & SARD, BUDGET NOT SUFFICIENT TO RENEW RENTAL ASSISTANCE, supra note 32, at 5. Some of the 2012 shortfall was made up by using operating reserves. Id. Current figures indicate that public housing requires $4 to $5 billion dollars per year in operating subsidies. HUD estimated the need for public housing operating subsidies at $4.96 billion for 2012, and proposed meeting that need through a combination of federal funding and existing operating reserves. U.S. DEP’T OF HOUS. & URBAN DEV., FY 2012 BUDGET SUMMARY 35 (2011). HUD requested $4.5 billion for public housing operations in the 2013 budget. FY 2013 BUDGET: HOUSING AND COMMUNITIES BUILT TO LAST, supra note 32, at 4. Affordable housing advocates estimated the actual operating needs of the public housing program under the Performance Funding System to be $5 billion. See RICE & SARD, BUDGET NOT SUFFICIENT TO RENEW RENTAL ASSISTANCE, supra note 32, at 5.

137 The initial 2013 budget request was $500 million below the operations needs of public housing. RICE & SARD, BUDGET NOT SUFFICIENT TO RENEW RENTAL ASSISTANCE, supra note 32, at 5. The budget experienced further cuts due to the 2013 sequester. RICE, supra note 36, at 1, 9–10.

138 See, e.g., Stockard, supra note 37, at 243; SARD & FISCHER, supra note 37, at 12–13; NAT’L HOUS. LAW PROJECT, supra note 28, § 1.24.

139 Federal funding to help maintain and update public housing developments first began in 1968. HUD FUNDING FOR PUBLIC HOUSING MODERNIZATION REPORT, supra note 15, at I-6. The funding structure has gone through several iterations over the years. Initially, local governments would apply “piecemeal” for needed repairs or updates at specific public housing developments. Id. In 1980, the Comprehensive Improvement and Assistance Program was enacted to allow comprehensive rehabilitations of specific public housing developments. Id. at I-6, I-7; NAT’L HOUS. LAW PROJECT, supra note 28, §§ 1.17–1.18. In the late 1990s, modernization funds were rolled in the capital fund, which is subject to annual appropriations. Id. § 1.18.

housing developments do not receive necessary ongoing maintenance,\textsuperscript{141} and repairs are often “triaged” to focus on low-cost band-aid repairs at the expense of more substantial needs.\textsuperscript{142}

As a result of insufficient capital funding, public housing has had a multibillion-dollar capital needs backlog for decades. In 1990, HUD estimated that there was a $22.3 billion unmet modernization need in the public housing program.\textsuperscript{143} By 1998, the capital backlog was estimated at $24.6 billion, with needs continuing to accrue at two billion dollars a year.\textsuperscript{144} As of 2011, public housing had a capital needs backlog of $25.6 billion, with needs accruing at $3.4 billion a year.\textsuperscript{145}

Despite dire assessments of the urgency and depth of need, the government has not acted to appropriate sufficient funds to address the backlog. In fact, between 2001 and 2009, the capital funding provided for public housing “declined substantially.”\textsuperscript{146} There was a one-time infusion of four billion dollars for capital fund improvements in public housing as part of the economic stimulus in 2010.\textsuperscript{147} Outside of the stimulus infusion, there has been little hope that the federal government

\textsuperscript{141} The 1992 report of the National Commission on Severely Distressed Housing found lack of sufficient federal appropriations a key factor in the poor physical condition of some public housing developments. \textit{1992 Final Report of the National Commission on Severely Distressed Public Housing}, \textit{supra} note 24, at \textit{3–5}.
\textsuperscript{142} \textit{Epp, supra} note 25, at 125 (“[B]etween 1985 and 1991 severely distressed developments with high modernization needs accounted for almost 20 percent of the national needs but received only 7.6 percent of the total modernization funding. At the same time, the developments with minimal needs, which also represented 20 percent of the total stock, received almost 40 percent of the modernization funding.”).
\textsuperscript{143} \textit{HUD Funding for Public Housing Modernization Report}, \textit{supra} note 15, at ES-5. HUD warned Congress that, “[w]ithout full funding, some portion of the existing public housing stock will not be upgraded to basic decent, safe and sanitary condition.” \textit{Id.} at ES-6. In 1992, the National Commission on Severely Distressed Housing estimated the cost to address the capital improvement needs of the 86,000 severely distressed units alone at $5.6 billion. \textit{1992 Final Report of the National Commission on Severely Distressed Public Housing}, \textit{supra} note 24, at 15. At the time of the report, there were 1.4 million public housing units nationwide. \textit{Id.} The Commission defined “severely distressed” public housing by considering a number of factors, including distress of families residing in the development, the serious crime rate in and around the development, the physical state of the housing, and “barriers to managing the environment.” \textit{Id.} at B-2.
\textsuperscript{144} \textit{ABT Assocs. 2000}, \textit{supra} note 38, at \textit{2–3}.
\textsuperscript{145} \textit{ABT Assocs. 2010}, \textit{supra} note 3, at \textit{v–vi}.
\textsuperscript{146} \textit{Rice \\& Sard, Decade of Neglect}, \textit{supra} note 37, at 16.
will in any meaningful way meet the physical needs of the aging public housing stock.

ii. Loss of Public Housing Units

The status quo is not a stable and financially sound public housing program. The federal government’s repeated failure to appropriate sufficient funds placed significant strain on public housing. This slow starvation and resultant deferred maintenance has taken its toll on the aging housing stock. Although a significant number of properties remain in decent condition, many of those have been subject to repeated patchwork repairs over the years and will need more comprehensive rehabilitation if they are to remain habitable. 148 As HUD Secretary Shaun Donovan has testified: “[A]n affordable housing project can limp along for some time with piecemeal, ad hoc strategies to address its accumulating capital backlog, but eventually the building will reach a ‘tipping point’ where its deterioration becomes rapid, increasingly expensive to remedy, and often irreversible.”

If public housing is to be preserved, funds must be found to address the outstanding capital needs.

The public housing program has lost more than 150,000 net units since the mid-1990s. 150 Approximately ten thousand public housing units have been lost each year over the last decade. 151 This loss will likely worsen as more local governments seek to reduce their public housing

148 The physical condition of public housing units is a concern both for the long-term preservation of the program and for the immediate impacts on the health and safety of current tenants, as there are significant health concerns attendant with poor housing conditions. See, e.g., HUMAN IMPACT PARTNERS ET AL., THE RENTAL ASSISTANCE DEMONSTRATION PROJECT: A HEALTH IMPACT ASSESSMENT 7 (2012). According to one report, “[m]ore than 85 percent of public housing units meet or exceed HUD’s physical condition standards and at least 40 percent of developments are considered physically excellent.” SARD & FISCHER, supra note 37, at 6.
149 H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 48 (written testimony of Shaun Donovan, Sec’y of Hous. & Urban Dev.). See also H. Subcomm. on Hous. & Cnty. Opportunity, Legislative Proposals to Preserve Public Housing, supra note 105 (statement of Sandra Henriquez, Assistant Sec’y for Public Hous. & Indian Affairs) (“The capital needs of our Nation’s affordable federally assisted housing stock are too substantial, and are too urgent for us to continue in this model.”).
150 H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 48 (statement of Shaun Donovan, Sec’y of Hous. & Urban Dev.).
151 FY2013 BUDGET CONGRESSIONAL JUSTIFICATIONS, supra note 29, at I-2.
In recent years, some local governments have attempted to get out of the public housing business altogether. Atlanta, Georgia, for instance, has demolished all of its existing public housing and replaced it with mixed-income housing and vouchers for displaced tenants. While many affordable-housing advocates decried the loss of public housing units, others lauded the effort and may follow the example set by Atlanta and similar jurisdictions.

A key factor driving local governments out of the public housing business is the insufficient and unpredictable funding stream. Even governments committed to public housing are finding it hard to keep up with the physical needs of the aging housing stock at current funding levels. New York City, which is often cited as having a high-performing public housing program, has faced significant challenges in recent

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152 H. Subcomm. on Hous. & Cmty. Opportunity, Legislative Proposals to Preserve Public Housing, supra note 149, at 1 (statement of Rep. Waters) (“[O]ver 200,000 public housing units have been permanently lost since 1995. The City of Atlanta has demolished all of its 25,000 public housing units. The San Diego Housing Commission has converted its entire stock of 1,366 public housing units to tenant-based vouchers. And I am hearing more and more reports of public housing agencies wanting to leave the program and serve families with vouchers.”). As of July 2008, there were pending applications at HUD to sell or demolish more than 16,000 public housing units. SARD & FISCHER, supra note 37, at 13.

153 It bears noting that the loss of units is likely also impacted by a perception that the program is politically unpopular. While that is a difficult impact to quantify, it is a clear factor in some decisions by politicians to reduce or modify the existing public housing stock. See, e.g., Harvey Rice, Critics Say New Galveston Mayor Can’t Block Public Housing, HOUS. CHRON., July 2, 2012, http://www.chron.com/news/houston-texas/article/Critics-say-new-Galveston-mayor-can-t-block-3679982.php (“A new Galveston mayor was propelled into office 10 days ago by a vociferous anti-public housing vote fueled by cost concerns, anti-government ideology and an undercurrent of racial and class animosity.”).


155 See, e.g., Lohr et al., supra note 105; Husock, supra note 104; Critics: Atlanta’s Blueprint to Change Public Housing Is Flawed (WTVR television broadcast May 4, 2012); SUSAN J. POPKIN ET AL., URBAN INST., PUBLIC HOUSING TRANSFORMATION AND CRIME: MAKING THE CASE FOR RESPONSIBLE RELOCATION (2012).

156 SARD & FISCHER, supra note 37, at 13 (“Faced year after year with inadequate funding, many agencies have concluded that they can no longer sustain some or all of their developments.”).

years in keeping up with repairs and renovation needs. As of late 2010, New York City public housing had a three-year backlog in maintenance requests.

The housing stock is aging; the majority of existing public housing developments are over thirty years old. It is unlikely that inaction will save public housing.

B. PRESERVING PUBLIC HOUSING MATTERS

It is worth discussing why we should be concerned with public housing preservation. Some see public housing as nothing more than a failed social policy. But public housing, despite its heretofore imperfect execution, carries many benefits. And the most logical way to promote public housing moving forward is to preserve the existing, affordable housing stock. Because the country is in the midst of an affordable-housing crisis, public housing is uniquely situated to serve the lowest-income renters, and preservation is more cost-effective than developing new affordable housing.

i. Affordable-Housing Crisis

There is a significant unmet need for affordable rental housing in the United States. As of 2009, 7.1 million renters had “worst-case housing needs,” which generally meant they paid more than half of their income in rent. The number of households with worst-case housing needs increased forty-two percent between 2001 and 2009. The largest category of renters with worst-case housing needs (thirty-eight percent)

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159 Buckley, *supra* note 158. The New York City Housing Authority recently proposed a plan to build private apartments on land related to public housing developments (such as parking lots and playgrounds) in an effort to raise funds to make necessary repairs to public housing. See, e.g., Mireya Navarro, *Tenants Worried by Plans to Build Near City Projects*, N.Y. Times, Mar. 12, 2013, at A16.

160 See, e.g., SARD & FISCHER, *supra* note 37, at 2, 11.

161 See *Crowley*, *supra* note 60.

162 WORST CASE HOUSING NEEDS, *supra* note 78, at 1. A renter has “worst case needs” if the household pays more than one-half of the household income in rent. *Id.* A very small percentage, 2.9% of worst case households, are so classified because of “severely inadequate housing” that has “serious physical problems.” *Id.*

163 *Id.*
was families with children. The lack of affordable housing is a problem across the nation; on average, more than forty-one percent of very-low-income renters in the United States have worst-case needs.

Extremely low-income renters, those whose incomes are at thirty percent or less of area median income, make up a significant portion of the country’s rental households. Of the forty million rental households in the United States, one in four, or 9.8 million, were extremely low-income in 2010, an increase of 200,000 individuals from the previous year. More than half experience worst-case housing needs. By some estimates, an additional 4.3 million affordable rental units would be needed to adequately house existing extremely low-income renters. As of 2010, only thirty affordable units per one hundred extremely low-income renter households were available.

Those numbers, distressing as they are, do not capture the full depth of the national need for affordable housing. The above-need calculations do not include the more than five million households who currently reside in subsidized affordable housing. The calculations do not include homeless individuals, as they are not renters.

The United States is facing a serious dearth of rental housing affordable to the lowest-income renters, and it is this particular population that most needs stable affordable housing. The private rental market, however, is simply not meeting the need. Low-cost rentals on the private market (units renting at less than four hundred dollars)

164 Id. at 5.
165 Id. at 10.
167 WORST CASE HOUSING NEEDS, supra note 78, at 3. Seventy-one percent of all households with worst-case housing needs are extremely low income. Id.
168 Bolton, supra note 166, at 1.
169 Id. at 2. To put this in context, it may be helpful to consider income as a function of the minimum wage. The full-time equivalent of the federal minimum wage is $15,000 a year. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2012, at 25 (2012). Between 2001 and 2010, “the number of renters earning $15,000 or less (in real terms) grew by 2.2 million.” Id. Over the same time period, the number of adequate units affordable to that population shrank by 470,000. Id.
170 See MCCLURE, supra note 1, at 1; WORST CASE HOUSING NEEDS, supra note 78, at 3.
declined by nearly thirty percent between 1999 and 2009. Across the United States, rental markets are tightening, and rents are increasing.\footnote{Joint Ctr. for Hous. Studies of Harvard Univ., supra note 169, at 25.}

\section{ii. Public Housing Is Uniquely Situated to Serve the Lowest-Income Renters}

Today, there are approximately 1.2 million remaining public housing units in the United States.\footnote{Id. at 24–26. This experience is also reflected on the local level. See Jenny Reed, D.C. Fiscal Policy Inst., Disappearing Act: Affordable Housing Is Vanishing Amid Sharply Rising Housing Costs (2012) (finding that rents in the District of Columbia rose fifty percent beyond inflation between 2000 and 2010).} Public housing is home to more than two million individuals in 3500 communities.\footnote{Joint Ctr. for Hous. Studies of Harvard Univ., supra note 169, at 15.} A slight majority of households are elderly or disabled.\footnote{2013 Final Report of the National Commission on Severely Distressed Public Housing, supra note 24, at 15.} Families with children make up forty percent of households.\footnote{Id. at 24–26.} Seventy-one percent of households are extremely low-income.\footnote{Id. at 24–26.} The majority of public housing residents would be unable to afford an apartment on the private market.\footnote{Id. at 24–26.}

Project-based subsidized housing, such as public housing, provides a particularly important source of affordable housing units that can be rented to successive households. If a family no longer requires subsidized housing and moves out, another low-income family can move in and receive the benefit of the subsidy. The ongoing federal operating subsidy ensures that the property remains affordable for the lowest-income renters.

Because federally subsidized units, such as public housing, provide one of the only sources of truly affordable rental housing, there is

\begin{itemize}
  \item Twenty-seven percent of public housing households are characterized as disabled, and thirty-one percent are characterized as elderly. \footnote{Id. at 24–26.}
  \item Forty-six percent of households contain only one member, and the average family size is 2.2 members. \footnote{Id. at 24–26.}
  \item The average gross income of a public housing household is a mere $13,427, and the average payment is $315 a month. \footnote{FY2013 Budget Congressional Justifications, supra note 29, at I-15.}
\end{itemize}
significant demand for the existing units. Because of funding limitations, as few as one quarter of eligible low-income households receive federal housing assistance. One estimate suggests there are over one million people currently on wait-lists for public housing and vouchers. Local jurisdictions, many of which keep their wait-lists closed, have recently experienced floods of applicants when they advertise the possibility of getting on the list for affordable housing.

Altogether, there are five million low-income households who are in affordable rental housing and receive the assistance of an ongoing federal subsidy. Absent the subsidy, these households would likely join the more than seven million current renters with worst-case housing.

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180 See, e.g., U.S. DEP’T OF HOUS. & URBAN DEV., WAITING IN VAIN: AN UPDATE ON AMERICA’S RENTAL HOUSING CRISIS (1999). Even in the late 1990s, wait lists in large jurisdictions had “grown to extreme proportions,” with wait times of ten years in Newark and Los Angeles, eight years in New York City, seven years in Houston, and five years in Washington D.C., and Cleveland. Id. at 7–8.

181 RICE & SARD, DECADE OF NEGLECT, supra note 37, at 4.

182 HUMAN IMPACT PARTNERS ET AL., supra note 148, at 3.

183 For example, Dallas recently saw 21,000 applications for 5000 spots on a wait list; in Plano, Texas, 8000 people applied for 100 housing vouchers; Cleveland has a wait list of 11,000 households for its public housing program. Patrick Markee, The Deep Freeze in Housing Aid: In a Crisis of Historic Scope, the Government is Slashing, Not Upping, Its Housing Budget, THE NATION, Jan. 2, 2012, at 25, 26. Dearborn, Michigan, reported 1233 names on a wait list for only ninety-six vouchers. Molly Tippen, Dearborn Section 8 Housing Applicants Outnumber Vouchers 10 to 1, DEARBORN PATCH, June 25, 2012, http://dearborn.patch.com/groups/politics-and-elections/p/demand-for-housing-subsidies-far-outstrips-availability. The District of Columbia, which long-maintained an open wait list, ultimately closed the list when the number of applicants on its wait list for public housing and tenant-based vouchers approached 70,000. See Aaron Weiner, Sorry We’re Closed: Housing Authority Wait List Is Suspended, WASH. CITY PAPER, Apr. 12, 2013, http://www.washingtoncitypaper.com/blogs/housingcomplex/2013/04/12/sorry-were-closed-housing-authority-wait-list-is-suspended/. The housing authority previously calculated it would take thirty-four years to clear the wait list in some need categories. See D.C. HOUS. AUTH., D.C. HOUSING AUTHORITY WAIT LIST (2012). When East Point, Georgia, opened its wait list for federal vouchers for the first time since 2002, 30,000 people showed up on a single day, and dozens were injured in the resulting melee. Craig Schneider & Tammy Joyner, Housing Crisis Reaches Full Boil in East Point; 62 Injured, ATLANTA J.-CONST., Aug. 11, 2010, http://www.ajc.com/news/news/local/housing-crisis-reaches-full-boil-in-east-point-62-/nQjJr/.

184 MCCLURE, supra note 1, at 1. The number does not include 1.67 million units developed with the assistance of low-income-housing tax credits. Id. Those units typically have rents set at thirty to sixty percent of area median income and are thus not affordable to low-income renters without the assistance of another subsidy such as a tenant-based voucher. See id.
needs.\textsuperscript{185} As the market has been unable to meet the depth of the current need for affordable rental housing, it is folly to believe the market would be able to absorb additional low-income renters. Existing federally subsidized housing thus provides an important resource to address a significant portion of the need for affordable rental housing across the country.

Some commentators decry federally subsidized housing, particularly public housing, as a failure.\textsuperscript{186} They argue that the programs concentrate poverty, create a culture of dependence, and damage communities.\textsuperscript{187} A detailed rebuttal regarding the social and financial impacts of public housing is beyond the scope of this Article, but public housing, while far from perfect, is a crucial piece of the social and economic safety net. The program has improved in recent years, as jurisdictions moved away from high-rise public housing developments.\textsuperscript{188}

\textsuperscript{185} The potential loss of units is an issue both in public housing and other programs, such as project-based Section 8. Of the project-based HUD-housing stock (which includes public housing), 700,000 units were lost between 1995 and 2009. America’s Rental Housing: Meeting Challenges, Building on Opportunities, supra note 114, at 5. The potential loss of units is particularly acute in the project-based Section 8 program, where private owners are able to opt out of the program at the conclusion of a subsidy contract. See 42 U.S.C. § 1437(f)(c)(8) (West, Westlaw through P.L. 113-31 approved Aug. 9, 2013). Private owners often opt out when the surrounding area gentrifies. See Rice & Sard, Decade of Neglect, supra note 37, at 17 (“[S]ome properties have appreciated greatly in value since the owners first agreed to participate in the program . . . . As a result, some owners face . . . strong financial incentives to convert their units to private-market use.”). The project-based Section 8 program has experienced significant losses of units, and 360,000 units were lost between 1995 and 2008. Id.


\textsuperscript{187} See, e.g., Husock, supra note 186; H. Subcomm. on Hous. & Cmty. Opportunity, Legislative Proposals to Preserve Public Housing, supra note 105 (statement of Rep. Emanuel Cleaver) (“[S]ince the Housing Act of 1937, we have had few defeats in domestic policy to match the defeats we have experienced in public housing.”).

\textsuperscript{188} The massive high-rise public housing tower racked with crime and drugs is a thing of the past, as most high-rise towers have been demolished. See, e.g., Jerry Adler, Toppling Towers, Newsweek, Nov. 4, 1996, at 70. As of 2008, outside of New York City, only 48,000 public housing units are located in large family projects. Sard & Fischer, supra note 37, at 6. This number excludes New York City, because the majority of its housing units are necessarily located in high-rise structures. Id.; see Bloom, supra note 157, at 45.
The fact is that the government is not offering another meaningful choice. The federal government is typically no longer in the business of providing project-based rental assistance, nor has the private market met the need for affordable housing. And there is no evidence that the loss of units will somehow spur an economic revolution. More likely, jurisdictions will be left to cope with an even greater number of low-income renters who cannot afford safe and sanitary housing and who will battle with issues such as homelessness.

Public housing, while not ideal, is also a better alternative for some renters than other types of affordable housing. The tenant-based voucher program is highly susceptible to shifts in the market; in jurisdictions with high levels of gentrification and a limited number of reasonably affordable private rental units, it is very difficult for a low-income household to find an apartment to rent.189 Those problems are exacerbated by the reluctance of some private landlords to participate in the voucher program.190 Vouchers can also impose higher costs on tenants than public housing.191 Public housing is also better equipped for hard-to-house families, such as families with social issues or mental illness, who may be unattractive to a private landlord.192

189 See, e.g., H. Subcomm. on Hous. & Cmty. Opportunity, Legislative Proposals to Preserve Public Housing, supra note 105, at 4 (statement of Rep. Maxine Waters, Chairwoman, H. Subcomm. on Hous. & Cmty. Opportunity) (“[Public housing is more effective than vouchers at serving low-income families in areas with a limited supply of affordable housing, low participation rates in the voucher program, and high rates of gentrification.”). Studies have found that tenants with vouchers have high levels of housing instability. See HUMAN IMPACT PARTNERS ET AL., supra note 148, at 8.

190 Even in jurisdictions with source-of-income discrimination laws, tenants with vouchers often have difficulty passing credit checks or other requirements common on the private market. See EQUAL RIGHTS CTR., STILL IN SEARCH OF DECENT HOUSING: A FIVE YEAR REFLECTION ON DISCRIMINATION AGAINST HOUSING CHOICE VOUCHER HOLDERS IN THE DISTRICT OF COLUMBIA 3, 4 (2011) (finding that twenty-six percent of tested landlords refused to accept vouchers, and thirty-five percent enacted barriers that barred most voucher holders).

191 Tenants can pay up to forty percent of their income in rent and utility costs when they initially rent an apartment with a voucher. See NAT’L HOUS. LAW PROJECT, supra note 28, at § 3.2.2.3.1. The program permits tenants to pay even higher percentages of income in rent if they remain in a unit and the rent increases. See id.

program is simply not an adequate alternative to the relative stability of project-based programs, such as public housing.193

The country is in dire need of affordable housing. The remaining public housing units help to meet a portion of the need by providing truly affordable rental housing to the lowest-income renters.

iii. Preservation Is Cost-Effective

Preservation of existing public housing is the most cost-effective way to maintain the current level of affordable housing. This is true even when the existing units need significant rehabilitation.194 The replacement value of the existing public housing stock has been estimated at between $90 and $145 billion.195 It would cost far less for the federal government to retain those units than to start from scratch and rebuild elsewhere.196

Nor is it likely the federal government has the motivation to replace lost public housing units with comparable affordable housing. Generally speaking, the federal government is no longer in the business of project-based housing creation. A lost federally subsidized housing unit is not typically replaced. Maintaining the current level of federally subsidized housing affordable to the lowest-income renters can be achieved only by preserving existing properties.

States cannot afford to replicate the long-term deep subsidies of public housing and comparable programs. Where states have enacted


194 America’s Rental Housing: Meeting Challenges, Building on Opportunities, supra note 114, at 38.
195 Epp, supra note 25, at 122; ECONSULT CORP., supra note 51, at 4.
196 See H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 47–48 (written testimony of Shaun Donovan) (“[I]t is far more costly to build new units than to preserve existing affordable housing.”).
affordable-housing programs, they are typically small in scale and are not comparable to subsidy levels public housing provides. If federally subsidized affordable housing is lost and not replaced, states and localities bear the brunt of an increased need for affordable rental housing, which can equate to an increase in households living in substandard housing or coping with homelessness. Either condition often imposes additional costs on state and local governments as they address the accompanying economic, social, and community harms.

It is crucial that public housing be preserved as an affordable housing resource. The need for affordable housing in the United States has reached critical levels, particularly for the lowest-income renters. Public housing provides affordable housing that satisfies that need and cannot be replaced by state and local governments. Preservation is the most efficient way to continue to provide the same level of rental housing affordable to the lowest-income renters.

IV. ANALYSIS OF RAD PRINCIPLES: IS IT WISE TO BORROW AGAINST PUBLIC HOUSING?

A. IS THERE ANY OTHER OPTION?

Do we need to open up public housing to private lending? Isn’t the simplest solution for the federal government to adequately fund public housing?

It has been estimated that the federal government could eliminate the public housing capital needs backlog in ten years by allocating an additional $2.5 billion per year. The federal government provided a four billion dollar cash infusion to the public housing program in 2010.

197 See, e.g., DANIOLO PELLETIERE ET AL., HOUSING ASSISTANCE FOR LOW INCOME HOUSEHOLDS; STATES DO NOT FILL THE GAP 4–9 (2008).

198 The cost of providing shelter and related social services to the homeless population is significant. See NAT’L ALLIANCE TO END HOMELESSNESS, CHRONIC HOMELESSNESS 1, 3–4 (2007) (estimating that chronically homeless individuals use $42,000 in public resources each year). Any increase in the homeless population imposes additional costs; when the District of Columbia faced an increase in family homelessness, it was forced to pay over a million dollars to house homeless families in hotels. See Lydia DePillis, With Shelters Over Capacity, City Housing 200 Families in Motels, WASH. CITY PAPER, Feb. 14, 2012, http://www.washingtoncitypaper.com/blogs/housingcomplex/2012/02/14/city-now-housing-200-families-in-motels/.


200 National Housing Law Project, HUD Introduces Transformation of Rental Assistance Proposals, 40 HOUSING L. BULL. 73, 73 n.1 (Mar. 2010) (“An additional $2.5 billion per year for the public housing backlog would amount to only two-thirds of one-tenth of 1% of the Administration’s overall proposed budget for FY 2011.”).
as part of the economic stimulus to great success. Providing funds directly to the public housing program could also have positive economic impacts that go beyond public housing. One study found that the 2010 stimulus cash infusion resulted not only in direct improvements to the public housing stock, but also in significant “indirect and induced economic activity” and job creation.

Providing the funds directly to the public housing program would likely be the most cost-efficient option for the federal government. The federal government will ultimately bear the cost of repaying debt service on converted public housing properties. Debt service on private loans, however, incorporates significant secondary costs, such as interest payments and transactional costs. If the federal government provided the funds directly to public housing, it would likely cost less because the secondary costs would be minimal.

The current economic climate and political realities make it incredibly unlikely that the federal government would embrace a direct funding proposal. It is a significant challenge every year to obtain the basic funding required to sustain public housing. More often than not, even those basic requirements are unmet. The Obama administration conceded as much and used the lack of forthcoming federal funds as a justification for leveraging proposals.

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202 ECONSULT CORP., supra note 51, at 2. The study estimated that every $1 spent by the government spurred “an additional $2.12 of indirect and induced economic activity . . . .” Id.

203 The RAD pilot program includes no such increase in appropriations. See infra note 221. Any expansion of the program, however, will necessarily require additional appropriations to be successful.

204 SARD & FISCHER, supra note 37, at 24. Transactional costs may include things such as “legal, appraisal, and accounting fees . . . .” Id.

205 Id. Although the federal government pays interest on its debts, the interest rate is significantly lower than rates on the private lending market. Id.

206 See RICE & SARD, BUDGET NOT SUFFICIENT TO RENEW RENTAL ASSISTANCE, supra note 32, at 1; Markee, supra note 183 (“Congress recently slashed the federal housing agency’s budget by $3.8 billion.”).

207 See H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 48 (statement of Shaun Donovan, Sec’y of U.S. Dep’t of Hous. & Urban Dev.) (“Given the size of the federal deficit and the challenges we’ve inherited, it’s clear the Federal government alone will not be able to provide the funds needed to bring properties up to date and preserve
While that is likely a correct assessment of the political landscape, it is worth noting that the federal government diverts significant resources to programs that benefit higher-income homeowners, such as the mortgage interest tax deduction. The mortgage tax deduction—which permits homeowners to deduct mortgage interest from their taxes—will cost the federal government an estimated $131 billion in 2012. That sum dwarfs the total HUD budget for 2012 (forty-four billion dollars), the 2012 public housing budget ($5.9 billion), and the total backlog of needed repairs to public housing developments (over twenty-five billion dollars). Tax incentives such as these are often referred to as the “hidden welfare state” and benefit primarily middle- and upper-income homeowners. Many have written about whether and how the tax incentive structure should be modified. For our purposes, it is worth noting that the government has made a choice to divert significant resources to benefit higher-income homeowners.

A meaningful conversation requires that the government consider all potential sources of revenue and all possible benefits of adequately funding public housing. An ideal solution is for the government to provide sufficient funds to preserve public housing. In the current political climate, however, this seems sufficiently unlikely that staking one’s hopes on this would be akin to a vote for the status quo of an underfunded, aging, and diminishing public housing program.

B. POTENTIAL BENEFITS OF PRIVATE CAPITAL

There is a fundamental appeal to RAD. Local governments own the public housing developments and the underlying land, much of which is
If private investors are willing to provide the funds so desperately needed to redevelop existing public housing developments and ultimately save the affordable housing stock, what could be better? And if the federal government is not willing or able to provide sufficient funds to save public housing, is there really a choice?

### i. The Capital Needs Backlog

The most compelling benefit of leveraging public housing developments is the access to much needed funds. Without necessary capital, more units will inevitably be lost, tenants will face poor conditions, and public housing will continue its physical decline. With adequate funds, the twenty-five billion dollar capital-needs backlog could be addressed. Existing public housing developments could receive much needed repairs and renovations. And action taken now could preserve the existing physical structures for years to come.

Local governments have demonstrated success in leveraging private capital. As of 2010, local governments accessed over three billion additional dollars by leveraging their public housing capital funds and leveraged significant additional capital with HOPE VI funds. Although those programs did not involve leveraging or mortgaging of public housing developments themselves, they are evidence that local governments are capable of successfully leveraging and utilizing private capital.

### ii. Long-Term Costs Savings

Proponents of utilizing the private market to address the capital needs of public housing argue that it will ultimately save the government money. That claim is questionable in the short term as annual appropriations will likely need to increase to repay debt service. In the long run, however, the program may ultimately provide cost savings if it results in the preservation of existing public housing developments.

HUD promoted RAD as a means to obtain capital funds at no, or minimal, cost to the government; yet RAD will incur debt service

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215 The estimated real estate value of the public housing stock has been valued at between $90 billion and $145 billion. See Epp, supra note 25, at 122; ECONSULT CORP., supra note 51.

216 See MCCARTY, supra note 17, at 35.


218 U.S. DEP’T HOUS. & URBAN DEV., FY 2013 PROGRAM AND BUDGET INITIATIVES, RENTAL ASSISTANCE DEMONSTRATION 1 (2012) (“RAD is a budget neutral solution to begin to address the pressing needs of the affordable housing inventory.”).
obligations.\textsuperscript{219} Funds must be available to repay the loans.\textsuperscript{220} It is likely that Congress will need to increase appropriations to cover that debt service if the program expands beyond RAD.\textsuperscript{221} Moreover, as discussed above, secondary costs likely render the overall cost to the federal government higher than if the government simply provided funds directly to public housing.\textsuperscript{222} The need to repay debt service also raises the stakes of the annual appropriations process.\textsuperscript{223} Any failure in this context could give rise to a serious foreclosure risk.\textsuperscript{224}

HUD ultimately acknowledged that bringing private capital into public housing would result in an overall increase in operating costs.\textsuperscript{225} Yet it argues that those costs will ultimately be offset because the government will need to provide lower appropriations for ongoing

\begin{footnotesize}
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  \item \textsuperscript{219} As one senator noted when Congress considered PHRI in 2002: “[O]n the surface, it looks like a way to draw in additional capital. But what would happen if—how would you service the mortgage? You’d have to build the cost of servicing the mortgage either into the rents, or you’d have to get some sort of grant year by year from the federal government in order to service the mortgage. Wouldn’t that be the case?” S. Comm. on Banking, Hous. & Urban Affairs, \textit{HUD’s Fiscal Year 2003 Budget and Legislative Proposals}, supra note 94 (statement of Sen. Paul Sarbanes, Chairman, S. Comm. on Banking, Hous. & Urban Affairs).
  \item \textsuperscript{220} The use of LIHTC may mitigate the amount of debt a property requires, but it is expected that most properties will incur some debt obligation and need to repay ongoing debt service.
  \item \textsuperscript{221} Congress refused to provide any additional funds for the pilot RAD program. Although HUD has tweaked the program to try to give local governments some limited ability to increase rents, in the absence of new funds, converted properties will largely remain tied to a term contract that is close to their current subsidy allocation. \textit{See Revised RAD Guidance PIH 2012-32 REV-1}, supra note 2, at 16–19. That likely means that properties that enroll in the pilot program will be those that are in decent physical condition and can support relatively high rents. Any expansion of the program beyond the pilot will require additional funds in appropriations to support conversions.
  \item \textsuperscript{222} \textit{See SARD & FISCHER}, supra note 37, at 24.
  \item \textsuperscript{223} Letter from Hous. Justice Network, supra note 57, at 160 (“[I]n order to support the new annual debt load, these increased appropriations would need to be maintained every year. By allowing agencies to borrow against public housing, the TRA program thus creates a somewhat rigid situation in which any increase in federal funding must be sustained consistently for the term of the loan . . . . [O]ne can only assume that the more expensive the TRA program ultimately costs, the greater threat there is that a future Congress at some point may even temporarily reduce funding, thus leading to the harmful consequences discussed under the ‘Foreclosure Risk’ section.”).
  \item \textsuperscript{224} \textit{AMERICA’S RENTAL HOUSING: MEETING CHALLENGES, BUILDING ON OPPORTUNITIES}, supra note 114, at 39.
  \item \textsuperscript{225} H. Comm. on Fin. Servs., \textit{2010 Hearing on Transforming Rental Assistance Initiative}, supra note 57, at 6 (statement of Shaun Donovan, Sec’y of Hous. & Urban Dev.).
\end{itemize}
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There is some validity to that argument. Over a period of time, it will cost more to make repeated patchwork repairs, followed almost inevitably by a major repair, than to simply make a major repair at the outset. The ultimate potential cost savings, however, arises out of the preservation potential. RAD may provide overall cost savings if it preserves existing public housing developments as long-term affordable housing.

### iii. Political Considerations

Political considerations also weigh in favor of adopting a proactive program to address the capital needs of public housing. Evidence of progress and significant prospects of stability could quell congressional handwringing over public housing. Attaching long-term subsidy contracts to developments could quiet arguments that public housing should be defunded. Contractual obligations may be more likely satisfied than variable requests in the annual appropriations process. And, perhaps most importantly, banks and other investors will have a vested interest in ensuring that converted public housing developments obtain necessary funding to operate and repay the debt service and may prove to be useful allies in budget negotiations. The political benefits of a successful program to integrate the private market into public housing may ultimately be significant.

## V. THE DEVILISH DETAILS: PRESERVATION RISKS IN THE RAD PROGRAM

If we accept that the public housing financing scheme must be reformed if public housing is to survive and that its survival is important, then it is necessary to consider very carefully whether RAD adequately meets that goal. This is all the more important because HUD has expressed the intent to expand the principles of RAD throughout the entire public housing portfolio after the pilot program’s conclusion.

Mortgaging public housing to address long-standing capital needs may ultimately provide significant benefits. RAD’s execution, however, is wanting. As formulated, RAD may fail to live up to its promise and, worse, result in the loss of deeply subsidized affordable housing. In part,
this is due to the inherent tension in incentivizing private investors to participate in a public benefits scheme that serves low-income renters. The government needs outside investors to participate in the program—and bring with them significant amounts of capital—if it is to succeed. Private investors are necessarily interested in financial gain and obtaining a solid return on their investment. It is difficult for the program to walk the line between giving investors sufficient security on their investment, while at the same time protecting the long-term preservation of converted public housing developments. Given the crucial position public housing holds in the social safety net, however, the emphasis must always be on preservation.

The section below addresses three main areas in which changes must be made to RAD and any successor programs to ensure the long-term survival of public housing developments: funding caps that incentivize a net reduction in public housing units must be lifted; the risks inherent in foreclosure must be minimized; and tenants must have a meaningful enforcement mechanism to protect the long-term stability and affordability of converted properties.

A. FUNDING CAPS: AN END-RUN AROUND PRESERVATION

The most pressing concern is a funding cap that could result in a significant reduction in subsidized units in converted properties. The final administrative guidance for RAD contains—over the strong objection of both local governments and affordable-housing advocates—a funding cap that incentivizes preserving only half of the units in a public housing development or converting properties to serve special-needs populations, such as the elderly or the disabled.

RAD envisions that public housing properties will convert to one of two subsidy streams. Under final program guidance, if a property converts to the PBV program, HUD will cap the number of units that can receive the project-based subsidy to only half of the current units. Convert ing public housing properties, most of which are one hundred percent occupied with low-income households, to a subsidy stream that provides funding for only fifty percent of the units typically means that only fifty percent of the units will be preserved. It is also likely that a long-term subsidy on only half of the units would add uncertainty regarding ongoing rent revenues at the property and could make it

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230 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.6(A)(2), at 32.

231 It is also likely that a long-term subsidy on only half of the units would add uncertainty regarding ongoing rent revenues at the property and could make it
half of the units will receive any kind of project-based long-term subsidy to keep the units affordable in the long term. It is unclear what will happen to the remainder of the units and the remainder of the tenants. The most likely scenario is that half of the tenants would receive tenant-based vouchers.\textsuperscript{232} So long as the tenants stayed on the property, the units would remain affordable. If and when those tenants move out of the property, however, the unit would lose its affordability guarantees and its source of funding.\textsuperscript{233}

There are some exceptions to the cap. For instance, if a property serves elderly or disabled populations or provides supportive services, all of the units may be funded.\textsuperscript{234} This anticipates that properties currently serving general family populations would convert to serving only special-needs groups. In response to concerns that tenants could be displaced, HUD guidance would permit existing tenants to remain, even if they did not fall into the special-needs population.\textsuperscript{235} When those tenants move out, however, subsequent households must be special-needs. The result will be a loss of affordable housing units for families without special needs, yet there is a significant and ongoing need for affordable housing for those families.

The requirement is also problematic because it imposes the limitation on the funding stream most likely to be attractive to local more difficult to obtain private financing on that property. See Letter from CLPHA and Reno & Cavanaugh PLLC, \textit{supra} note 229, at 16.

\textsuperscript{232} Tenant-based vouchers are distinct from the PBV program as they represent a housing subsidy that is tied to a household, rather than a unit. If the household moves, the tenant-based voucher moves, as well, and the unit ceases to be affordable. For more information on the tenant-based voucher program, see \textit{supra} Part II.a.i.2. The logistics of funding only half of the property are unclear in either the proposed or final notice, and it is not certain that such vouchers would be forthcoming. Another alternative is to relocate the tenants to public housing units in different developments. Either option results in a net loss of public housing units.

\textsuperscript{233} \textsc{Rev. \textit{Rad. Guide.} PIH 2012-32 REV-1, \textit{supra} note 2, $1.6(A)(2)$, at 32.

\textsuperscript{234} \textit{Id.}; 24 C.F.R. § 983.56 (2005). The requirement regarding supportive services is problematic because many families do not require supportive services, and local governments typically do not have the means to pay for additional services. See Letter from CLPHA and Reno & Cavanaugh PLLC, \textit{supra} note 229, at 15–16; Letter from the Nat’l Low Income Hous. Coal., \textit{supra} note 229, at 2.

\textsuperscript{235} \textsc{Dep’t of Hous. \\& Urban Dev., Rental Assistance Demonstration: Final Program Notice, 77 Fed. Reg. 43,850, 43,851 (July 26, 2012) (“Grandfathers current residents from any requirement to receive supportive services in a property converting assistance to PBVs.”).
The PBV program is familiar, would be easier to administer, and could earn administrative fees. The guidance thus incentivizes the use of a funding stream that is likely to result in either the loss of half of the public housing units or the conversion of the property to serve solely special-needs populations. This is a crucial issue that must be resolved if RAD is to be adopted broadly.

HUD must lift the funding cap limitations on converted properties contained in final RAD guidance. The program cannot serve its preservation purpose if it results in a net loss of units or limitation of properties solely to special-needs tenants. Local governments must be permitted to convert one hundred percent of the units in a public housing development to a PBV funding stream without limitation. Anything less subverts the stated intent of RAD as an affordable-housing preservation program.

B. FORECLOSURE AND THE PRESERVATION CONUNDRUM

The specter of foreclosed public housing developments loomed large in policy discussions surrounding RAD. HUD repeatedly faced questions and skepticism on this issue. Does the property become privately owned? Could a bank or for-profit entity own and operate public housing? What happens if a private owner fails to comply with public housing rules and regulations? What happens to tenants’ rights?

236 The PBV program is a current program that is utilized across the country. The alternate funding stream, the project-based section 8 program, was the primary source of privately owned project-based units from the mid-1970s until 1983. See supra Part II.a.i. No funds have been appropriated for new units under that program, however, since 1983. Neither HUD nor local governments have any recent experience utilizing the program to create new developments, and there is some uncertainty as to how and whether the regulatory structure will function in the context of RAD conversions. See Letter from CLPHA and Reno & Cavanaugh PLLC, supra note 229, at 15–17.


239 See, e.g., id. at 5 (statement of Rep. Barney Frank) (“So that is what concerns me . . . . [Y]ou anticipate under this, you could wind up with a foreclosure and a private ownership of public housing. Are they then required to maintain this public housing in perpetuity? Does a tenant or anyone else have the same constitutional rights vis-à-vis that owner in the municipalities? . . . What is the status of a potential private owner of public housing?”). When satisfactory answers to those questions were not immediately forthcoming, several members of Congress pronounced the program too risky to proceed. Id. at 36 (statement by Rep. Barney Frank) (“[I]f the price of accessing private capital is to put public ownership at risk, that may be too high a price.”); id. at 9 (statement by
The risk of foreclosure, while it should not be overstated, is real when public housing properties are mortgaged. In 2010, when HUD first proposed bringing the private market into public housing, the country was just starting to climb out of what many researchers termed the “Great Recession.” The accompanying foreclosure crisis impacted homeowners and renters of both single- and multifamily properties. Although HUD imposed some borrowing limitations in RAD to protect against the riskiest loans, the recent foreclosure crisis is evidence that any borrowing secured by real property carries a risk of foreclosure.

Federally subsidized properties are potentially at a greater risk of foreclosure because they depend on annual appropriations to satisfy the debt service. Public housing has suffered from very recent congressional failures to appropriate sufficient funds. A history of lower-than-needed appropriations raises the serious concern that Congress will fail to appropriate sufficient funds in the future to support debt service and that properties will be at risk of foreclosure. RAD contemplates properties

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240 See, e.g., PHIL OLIFF ET AL., STATES CONTINUE TO FEEL RECESSION’S IMPACT 1 (2012).


242 These include a prohibition on variable interest rate loans and the limitation on some loans that require balloon payments. See REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.4(B)(1).

243 “The primary reason that foreclosure is a concern is that the borrowing contemplated by the TRA program can only be repaid if annual Congressional appropriations are increased and sustained at least for the term of the debt.” Letter from Hous. Justice Network, supra note 57, at 155. “[U]nderfunding, coupled with the granting of a security interest to a third-party with the right to
will convert to term subsidy contracts and, while this is intended to provide assurances of regular payments, such assurance is not a given. In the late 2000s, the federal government failed for several months to make the payments due under term subsidy contracts in the Project-Based Section 8 program.\textsuperscript{244} As recently as the Fiscal Year 2013 budget, HUD proposed to short-fund the existing term contracts, a measure by which Congress appropriates only a portion of the funds due under the contracts.\textsuperscript{245} Short-funding of term contracts can have negative consequences, such as decreased services for residents and remedial measures by wary investors, such as requiring increased debt coverage.\textsuperscript{246}

The risk of foreclosure must be taken seriously and proposed foreclosure protections scrutinized closely.

\textit{ii. RAD Foreclosure Protections}

RAD provides some protections intended to keep converted public housing properties affordable. All loans taken out against a converted property will be subject to a HUD Use Agreement recorded in first position.\textsuperscript{247} The Use Agreement supersedes all liens, so the Agreement’s terms should therefore survive foreclosure.\textsuperscript{248} The RAD statute requires sell off the property in the event of default, exacerbates that threat.” Id. (emphasis in original). There are other potential reasons a foreclosure could occur, such as financial mismanagement. Id.

\textsuperscript{244} Growing Reports of a Project-Based Section 8 Funding Crisis as FY 2007 Closes, 37 HOUSING L. BULL. 149, 149 (2007); Congress Considers Solutions for the Project-Based Section 8 Funding Crisis, 38 HOUSING L. BULL. 87, 87 (2008); Congress Acts to Address Project-Based Section 8 Funding Crisis, 38 HOUSING L. BULL. 213, 213 (2008).

\textsuperscript{245} See U.S. DEP’T OF HOUS. & URBAN DEV., FISCAL YEAR 2013 PROGRAM AND BUDGET INITIATIVES: AFFORDABLE HOUSING RENTAL ASSISTANCE 1 (2012); FY 2013 BUDGET: HOUSING AND COMMUNITIES BUILT TO LAST, supra note 32, at 5. After an outcry by affordable housing advocates and property owners, the contracts were ultimately funded in full for FY2013. See DOUGLASS RICE, SENATE FUNDING BILL IMPROVES ON PRESIDENT’S BUDGET REQUEST FOR RENTAL ASSISTANCE 4–5 (2012).


\textsuperscript{247} REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.4(B)(1).

\textsuperscript{248} Note that the final RAD guidance omitted language in the preliminary RAD guidance that the Use Agreement be “designed to survive foreclosure.” Compare RAD GUIDANCE PIH-2012-32 (HA), supra note 2, at 12, with PIH-2012-18 (HA), supra note 70, at 11. As the Use Agreement is recorded in first position, however, the foreclosing entity should take the property subject to the terms of the Use Agreement. See U.S. DEP’T OF HOUS. & URBAN DEV., OFFICIAL
HUD to offer, and an owner to accept, subsidy contract renewals, and
HUD appears to contemplate that the subsidy contract could also survive
foreclosure.249

HUD also has several affirmative tools it can utilize to preserve
affordable housing. For instance, if HUD finds an ownership change is
necessary “in its sole discretion,” it can require that ownership be
transferred first to a capable public entity.250 HUD can also transfer the
subsidy contract and the Use Agreement to a different property if, for
instance, the initial property becomes economically non-viable or
physically obsolete.251 Such a transfer could preserve the subsidy
contract and the net number of affordable units, even in the event that the
original property becomes untenable.

The foreclosure protections are not insignificant and, ideally, could
shield some converted properties from loss of affordability. The current
protections contemplate that a foreclosure would occur as follows: The
bank forecloses on the property and sells it to a public entity approved
by HUD.252 The public entity takes over the term subsidy contract and
remains subject to the Use Agreement.253 The property remains
affordable to the lowest-income renters. Alternatively, HUD recognizes
the property is in distress before a foreclosure occurs and, taking into
consideration the best interests of the tenants, transfers the subsidy (and
the tenants) to a different, yet suitable, property.254 Under these
scenarios, affordable housing is preserved, and all is right with the
world.

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249 The authorizing statute provides “[T]he Secretary shall offer and the owner
of the property shall accept renewal of the [subsidy] contract.” Consolidated and
672, 675 (2011). See also REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra
note 2, §§ 1.6(B)(2), 1.7(A)(2). The guidance indicates that the “PHA shall
accept” contract renewal, but defines that term to include all owners of
converted public housing developments. REVISED RAD GUIDANCE PIH-2012-32
REV-1, supra note 2, §§ 1.6(B)(2), 1.7(A)(2), at 13.
250 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.6(B)(3).
251 Id. §§ 1.6(B)(7), 1.7(A)(8).
252 Id. at 34, 47–48.
253 See RAD GUIDANCE PIH-2012-32, supra note 2, at 12.
254 REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, at 37, 50–51.
The world of subsidized housing preservation, however, seldom operates so cleanly. The RAD foreclosure protections do little to ward off the non-traditional foreclosure scenario. A primary concern is that the HUD Use Agreement does not necessarily require the continued operation of the property as rental housing affordable to the lowest-income renters. Absent the subsidy contract, the Use Agreement requires only that the property remain affordable for the highest echelon of low-income renters, and not the extremely low-income public housing population.

The Use Agreement is one of two documents that require affordability at a converted public housing property. The subsidy contract requires the owner to maintain the property’s affordability for the lowest-income renters. In exchange, the owner receives ongoing subsidies from the federal government. The Use Agreement is recorded on the property in first position.\textsuperscript{255} The Use Agreement is for the same term as the subsidy contract and automatically renews upon subsidy contract renewal.\textsuperscript{256}

The potential problem arises if the subsidy contract terminates.\textsuperscript{257} Absent the subsidy contract, the Use Agreement remains in effect for the duration of the expected contract term.\textsuperscript{258} The Use Agreement requires only that the property remain affordable for tenants with incomes at or below eighty percent of area median income, a relatively high income threshold.\textsuperscript{259} Rents can be set at up to thirty percent of that higher income and not the income-based rents of public housing.\textsuperscript{260} Yet more than seventy percent of existing public housing tenants are extremely low-income and have annual incomes of less than thirty percent of area median income.\textsuperscript{261}

The result of this distinction is twofold. First, if a subsidy contract is terminated, the property will cease to be affordable to the lowest-income tenants, who are most in need of affordable housing. Although tenant-
based vouchers would likely protect existing tenants, the property itself would cease to be affordable in any meaningful way.\textsuperscript{262} There is admittedly a justification for the distinction. If the subsidy contract is terminated, and the federal government is no longer providing the funds to fill the gap between tenants’ income-based rents and operations expenses, it is unrealistic to expect an owner to operate the property as public housing.\textsuperscript{263}

The second and most troubling result of this distinction, however, is its incentive to owners—particularly in the case of an ownership transfer due to foreclosure—to get out of the subsidy contract so they can convert the property to the significantly higher-income use.\textsuperscript{264} If the subsidy contract is terminated, perhaps because the property is not adequately maintained and falls into poor physical condition or even because the new owner refuses to be a party to the contract, the property can be converted to a higher-income use, eliminating it as a long-term source of affordable housing.\textsuperscript{265}

The program does not have to be structured in such a manner. RAD could incentivize preservation by modifying the Use Agreement to require that the owner maintain the property’s affordability for the lowest-income renters, even in the absence of the subsidy contract.

\textsuperscript{262} To illustrate the impact of the distinction, it is useful to consider the area median income (AMI) of a particular location. The AMI for a family of four in Minneapolis, Minnesota, is just over $83,000. \textit{FY2012 Income Limits Summary}, U.S. DEP’T OF HOUS. & URBAN DEV., http://www.huduser.org/portal/datasets/il/il2012/2012summary.odn (last updated Dec. 13, 2011). A family that is classified as extremely low-income (at or below thirty percent of AMI) has an annual income of about $25,000. \textit{Id}. The Use Agreement requires only that properties be affordable for tenants at eighty percent of AMI. In Minneapolis, that is an income of $65,000 annually. \textit{Id}. Further, it requires only that rents be set at thirty percent of eighty percent of AMI. In English, this means that a property where most tenants have incomes of less than $25,000 and were paying a portion of their income in rent could now charge monthly rents of almost $2000.

\textsuperscript{263} Under the current public housing program, tenants’ rents cover only about forty percent of the operating costs. \textit{See} Cavanaugh, \textit{supra} note 7, at 231.

\textsuperscript{264} These skewed incentives could arise outside of the foreclosure context, as well. If, for example, a property is threatened with the loss of the subsidy contract due to poor condition, the owner is faced with a choice. The owner could make the repairs required to maintain the subsidy contract and continue to operate the property as deeply subsidized affordable housing. Alternatively, the owner could do nothing, and the contract could well be terminated. If the property is in a gentrifying area, the owner likely has a financial incentive to see the subsidy contract terminated.

\textsuperscript{265} Although HUD has the authority in these circumstances to transfer the subsidy contract to another property, it has not utilized that authority in any meaningful way in the project-based Section 8 program.
Under that scenario, a property owner would have a significant incentive to retain the subsidy contract and thereby preserve the property as deeply affordable housing. This again illustrates the challenge of incentivizing private investment into an affordable housing program. Providing investors or subsequent owners with an “out” in the Use Agreement could incentivize investment and private participation in the program. It also, however, could put the long-term affordability of the housing at risk as it provides a means by which an owner could covert the property to a much higher-income use. When balancing these competing interests, HUD must fall on the side of preservation if RAD is to reach its stated goal of affordable housing preservation.266

HUD and affordable-housing advocates must carefully consider the impact of incentives in the RAD proposal. Unfortunately, the current iteration of RAD provides potential incentives for owners to convert the property to a higher-income use in the event of foreclosure.

iv. Limiting the Foreclosure Risk

One way to protect against the potential loss of affordability following foreclosure is to limit the possibility that the converted public housing property will face foreclosure in the first place. Additional requirements, such as federal loan guarantees, requisite use of FHA-insured loans, or continued government ownership of the underlying land, could minimize the risk that a property will face foreclosure.

HUD could require that all loans secured by converted public housing developments be FHA-insured.267 FHA insurance would limit risks to lenders and incentivize private investment.268 It could also protect against the possibility that inadequate appropriations would lead to foreclosures, as the federal government would have a financial incentive to avoid default.269 Most importantly, it would better protect public ownership by making it less likely the private lender would foreclose and assume ownership.270 FHA insurance, however, does have

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266 It is possible that modifying the Use Agreement in this way could result in a higher cost of lending, if it is perceived by lenders as increasing their risk. HUD should consider alternative means to encourage lender participation while incentivizing preservation, perhaps by embracing loan or other guarantees.

267 The RAD program acknowledges the potential benefits of FHA-insured loans and recommends, but does not require, use of insured loans. REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, at 25.

268 See Letter from CLPHA and Reno & Cavanaugh PLLC, supra note 229.

269 FHA insurance could also make the concept of lending on a converted public housing property more attractive to potential investors. See id. (“[A]ctive and streamlined participation by FHA will be a crucial component of this program.”).

270 H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 139, 155.
potential drawbacks. The program imposes certain requirements, such as mortgage insurance, that could ultimately increase the cost of borrowing.271

HUD could also guarantee loans secured by public housing developments. Many have raised the idea of a federal loan guarantee in the context of leveraging public housing.272 The Bush administration proposed that HUD guarantee eighty percent of loan principal in its PHRI proposal.273 Similar to FHA insurance, the guarantee would incentivize lending and provide some protection against foreclosure. A HUD guarantee, however, could be structured to avoid mortgage insurance requirements and potentially be a better fit for the strictures of the RAD program.

Finally, a public housing leveraging scheme could require a local government to retain ownership of the underlying land and mortgage only the development itself. This was the approach recommended by the National Commission on Severely Distressed Public Housing in 1992.274 Retained land ownership has also been discussed in the context of RAD discussions.275 Preservation of the land itself, while no guarantee of long-term survival of the existing affordable-housing structure, has important benefits. The continued real estate interest gives the local government a stake in the long-term operation of the property, even in the event of a foreclosure. It could also preserve at least the land for

271 HUD issued special guidance to attempt to overcome procedural hurdles that would make it difficult for RAD properties to access FHA insurance. See REVISED RAD GUIDANCE PIH-2012-32 REV-1, supra note 2, § 1.4(B)(4).
272 See H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 36 (statement of Rep. Barney Frank) (“[T]here may be other ways to do this that may involve alternative guarantees.”); id. at 33 (statement of John B. Rhea, Chairman, New York City Hous. Auth.) (“Any private market capital financing should be insured by the Federal Housing Administration or should be subject to a government guarantee.”).
273 Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations for Fiscal Year 2004, supra note 126, at 17 (statement of Mel Martinez, Sec’y of Hous. & Urban Dev.) (“The fiscal year 2004 budget enhances this proposal . . . by also proposing a guarantee of up to 80 percent of the principal of loans made to provide the capital for PHRI.”).
275 H. Subcomm. on Hous. & Cmty. Opportunity, Legislative Proposals to Preserve Public Housing, supra note 149, at 17 (statement of Rep. Marchant) (“But owning the land, you could do it on a 99-year lease. Owning the land, you don’t give up the kind of ownership, and you really have the control.”).
potential reuse as affordable housing in the event of a foreclosure and loss of affordability guarantees.\footnote{As one preservation advocate summed it up: “Whatever strategy is appropriate for a particular site, an almost universal principle is ‘Don’t give up the land.’” Stockard, \textit{supra} note 37, at 254.}

Additional protections are necessary to protect the long-term affordability of converted public housing properties under RAD. Added requirements, such as FHA insurance, federal loan guarantees, or continued ownership of the underlying land, could provide additional safeguards against foreclosure.

\section*{C. Meaningful Enforcement Mechanisms}

Even the best preservation protections are only as good as the individual or entity enforcing those protections. It is notable that many of the protections in RAD hinge upon HUD’s willingness to actively enforce preservation provisions. That, in and of itself, is a concern. HUD is an executive agency, and its actions often reflect the current administration’s political agenda. As the history of public housing privatization efforts demonstrates, there is no assurance that the next administration, or the administration two decades from now, will be committed to preserving public housing.\footnote{H. Comm. on Fin. Servs., \textit{2010 Hearing on Transforming Rental Assistance Initiative}, \textit{supra} note 57, at 12 (statement of Rep. Watt) (“I want to say publicly that I have eminently good confidence in you in this Administration making those decisions, but I tell you I wouldn’t have had a hill of beans worth of confidence in the last Secretary of HUD in the last Administration making those same decisions.”).}

If foreclosure or another action threatens the long-term affordability of a converted public housing property, HUD will likely need to act affirmatively to enforce any foreclosure protections and preserve the property. There have been numerous instances in the past decade, however, where HUD failed to comply with, much less enforce, its own rules and regulations regarding the preservation of foreclosed federally subsidized properties, including the preservation of a long-term subsidy contract in the event of foreclosure.\footnote{See, e.g., \textit{Federal Court Rules HUD Violated Federal Disposition Act}, 34 \textit{HOUSING L. BULL.} 229 (2004).} In one relatively recent case, HUD was found to have forced a foreclosure of a federally subsidized Pittsburgh property and illegally terminated the rental subsidy contract in order to compel the tenants to vacate so the property could be redeveloped.\footnote{The property, East Hills Park, was a 140-unit low-income cooperative with a project-based Section 8 contract with HUD. Kevin Quisenberry, \textit{HUD’s Failure to Preserve Subsidy in Multifamily Foreclosure Illegal, Third Circuit Holds and Remands Regarding Displacement}, 44 \textit{CLEARINGHOUSE REV.} 495, 495 (2011).} Affordable-housing advocates are, reasonably, concerned...
that HUD discretion and HUD enforcement mechanisms are insufficient protection. And yet, it is impossible for the drafters of statutes and regulations to foresee every possible outcome and determine in advance what action will be necessary to preserve a property. Some discretion is needed.

The individuals most likely to be motivated to preserve a converted public housing development as affordable housing are the current residents. The rights of tenants to bring and maintain an action against either HUD or the owner of the converted property, however, are murky. If the property converts from public to private ownership, for instance, the tenants may have only a limited ability to claim a violation of certain constitutional rights, such as due process and equal protection. Experience in the privatization of public benefits, such as TANF, indicates there will be significant challenges in determining the rights of tenants and how those rights can be enforced.

Residents should have clear authority to enforce key provisions in the documents between HUD and the property owner, including issues of subsidy, affordability, and physical conditions. To improve the

When Pittsburgh became interested in redeveloping the area, several developers were “wary of investing in that neighborhood unless and until the physical and social issues [w]ere resolved.” Id. (quotation omitted). A HUD official was part of the task force that concluded the property should be redeveloped with fewer rental units. Id. That year, HUD claimed the cooperative technically defaulted on its mortgage, suspended payments under the project-based Section 8 contract, and ultimately foreclosed on the property. Id. Most tenants vacated the property in response to continued pressure by HUD to move. Id. The remaining tenants sued, and the Third Circuit ultimately held that HUD failed to comply with laws that required it to maintain the rental subsidy. Id.; see Massie v. HUD, 620 F.3d 340 (3d Cir. 2010).

280 “[T]he TRA program will require a steadfast commitment to preservation from HUD in the event of foreclosure. However, past experience with troubled properties in the privately-owned, HUD-assisted context has demonstrated that even the dictates of federal multifamily mortgage foreclosure law have not prevented the attrition of critical use restrictions and termination of Section 8 contracts upon foreclosure.” Letter from Hous. Justice Network, supra note 57, at 156.

281 See, e.g., NAT’L HOUS. LAW PROJECT, supra note 28, § 16.41–42; H. Comm. on Fin. Servs., 2010 Hearing on Transforming Rental Assistance Initiative, supra note 57, at 36 (statement of Rep. Frank, Chairman, H. Comm. on Fin. Servs.) (“I worry about a situation in which units that are now owned publicly are foreclosed upon and become privately owned. I think that raises serious issues constitutionally of the diminution of rights you have against a public entity versus a private entity.”).


283 Legislation has previously been proposed to provide tenants in project-based subsidized property a clear third-party beneficiary right of enforcement. See
potential enforcement, tenants should have an express third-party beneficiary right to enforce the affordability and related provisions in a converted property. Courts have reached disparate decisions regarding whether tenants of federally subsidized privately owned affordable housing are intended third-party beneficiaries.  

Notably, in the aftermath of decisions finding tenants had a third-party beneficiary right, HUD amended its documents to preclude any tenant right of enforcement, a limitation generally upheld by the courts.

Some have raised concerns that tenant enforcement power may “hinder preservation efforts requiring bold steps that can sometimes defy popular resolution.” But the benefit that tenants can bring to the table in enforcement power overcomes any such concerns. There are numerous examples of tenants filing and litigating actions to preserve federally subsidized housing. Tenants have the incentive to act quickly in the event of a threat to the affordability of their building. Even when HUD is committed to preserving a particular property, it may not be able to react to a preservation threat as quickly as the tenants. A clear right to enforce subsidy contracts and affordability restrictions gives tenants the

Housing Preservation and Tenant Protection Act of 2010, H.R. 4868, 111th Cong. § 303 (2010). The bill was approved by the House Financial Services Committee but failed to advance further.

Compare Holbrook v. Pitt, 643 F.2d 1261, 1271 (7th Cir. 1981) (holding that tenants are third-party beneficiaries: “If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt.”), and Ashton v. Pierce, 716 F.2d 56, 66 (D.C. Cir. 1983) (“[I]t is difficult to imagine any purpose of the contract other than to benefit tenants of public housing.”), with Velez v. Cisneros, 850 F. Supp 1257, 1277 (E.D. Pa. 1994) (disagreeing with Ashton v. Pierce and finding tenants were not third-party beneficiaries); Perry v. Hous. Auth. of Charleston, 664 F.2d 1210 (4th Cir. 1981) (rejecting a third-party beneficiary claim and finding tenants were only incidental beneficiaries).

See, e.g., Anderson v. D.C. Hous. Auth., 923 A.2d 853, 863 (D.C. 2007) (“HUD revised its HAP contracts to explicitly state that tenants are not considered third party beneficiaries and are therefore not entitled to enforce any provision of the HAP contract . . . . Ms. Anderson’s claim that she is entitled to the HUD subsidy as a third-party beneficiary of the HAP contract between DCHA and her landlord must be rejected on its face because of the plain language in the HAP contract limiting her ability to claim such status.”) (emphasis in original).


leverage to bring the property owner to the table to negotiate and could avoid unnecessary litigation.

HUD should therefore include clear language providing tenants and tenants’ associations a third-party beneficiary right to enforce subsidy contracts, affordability restrictions, and Use Agreement terms on any public housing property converted under RAD or subsequent iterations of the program.

CONCLUSION

The remaining 1.2 million public housing units represent a crucial piece of the country’s social safety net. Affordable to the lowest-income renters, public housing units help to meet the crushing need for truly affordable rental housing. Yet public housing is a finite resource with an uncertain future. The aging housing stock has been punished by long-standing underfunding by the federal government and the resultant deferred maintenance. The program needs access to significant capital for renovations if it is to survive.

Keeping with the decades-long trend of privatizing federal housing policy, the government’s response is to open public housing to private lending. Through the current RAD pilot, and an anticipated expansion of its principles to the full public housing stock, local governments will be able to leverage public housing developments to access private capital. Participating properties will also convert from the current appropriations-based funding system to long-term subsidy contracts.

The underlying concept of utilizing the private market to obtain needed capital funds is likely the best chance public housing has to survive as an affordable-housing resource. The status quo, which currently results in a loss of at least ten thousand units annually, is unsustainable. It is unrealistic to believe the federal government alone will meet the capital needs of public housing, as the current need tops twenty-five billion dollars and continues to grow. Access to private capital, however, will allow local governments to address the backlog in capital needs, preserve public housing properties for the long term, and may provide some protection against political interference with the program.

While RAD’s concept is sound, its execution is troubling. RAD provides incentives to either preserve only half of the units in a given property or limit the property solely to special-needs groups. RAD fails to adequately protect against a loss of affordability through foreclosure and, in fact, provides some incentives for a new property owner to convert a property to a higher-income use. Finally, achieving RAD’s preservation goals will require HUD to exercise its discretion and
enforce its regulations in a preservation-minded way, something HUD has struggled to do in the past.

The RAD program is salvageable. With modifications, such as removal of funding caps, improved protections against foreclosure and the potential loss of affordability as a result, and the provision of a meaningful enforcement mechanism to tenants, RAD and any successor program could be an important mechanism to preserve public housing as a long-term affordable housing resource. Unfortunately, without such changes, there is a risk that RAD will fail to achieve its purpose and lead to further loss of federally subsidized affordable rental units.