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Part IV: Discussions on the State and Local Level

Chapter 7: Federalism

Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality

Otto J. Hetzel*

I. INTRODUCTION

On October 21, 1998 the Independent Agencies Appropriation Act for Fiscal Year 1999 became law.¹ Title V of the Act, called the Quality Housing and Work Responsibility Act of 1998 (QHWRA or the 1998 Act), had been tacked onto fiscal appropriations legislation that provided funds for the United States Department of Housing and Urban Development (HUD), the federal department responsible for national housing policy.² This Appropriation Act was the only available legislation at the time that provided a potential vehicle for enactment of substantial revisions in United States public housing

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1. H.R. 4194, 105th Cong., 2d Sess. (1998); Pub. L. No. 105-276.

2. H.R. 4194, 105th Cong., 2d Sess. (1998), 42 U.S.C. § 1437 *et seq.*, Title V, PUBLIC HOUSING AND TENANT-BASED ASSISTANCE REFORM, §§ 501-599H. That Act also appropriates funds each fiscal year for other federal agencies such as the Environmental Protection Agency (EPA), the Department of Veterans Affairs (VA), and the National Aeronautics and Space Administration (NASA), and other independent agencies.

policy that had been under consideration in Congress for several years.³

In enacting QHWRA Congress announced that, “The bill . . . deregulates the operation of public housing authorities . . . and gives more power and flexibility to local governments and communities to operate housing programs.”⁴ The Committee Report points out that, “[I]t is the policy of the United States to assist States and political subdivisions of States to remedy unsafe housing conditions and housing shortages and to vest in public housing agencies [PHAs] the maximum amount of responsibility and flexibility in program administration. . . .”⁵

What exactly is the “maximum amount of responsibility and flexibility” appropriate for local governments to exercise over operation and utilization of the federally funded public housing program appears to be substantially influenced by whether one is viewing the issue from federal or local policy perspectives. That question lies at the heart of the evaluation undertaken in this analysis.

3. This legislative path, however, involved congressional committees involved in funding decisions rather than in developing housing policy. As a result, the congressional committees that normally are involved in fashioning federal housing policy were not directly involved in fashioning the final version. The legislation had initially been touted as one of the more significant revisions of federal legislative policy concerning housing in decades by Rick Lazio (R. NY), chairman of the Subcommittee on Housing and Community Opportunity of the House Banking and Financial Services Committee. His draft contained a number of provisions that would have made fundamental changes requiring HUD to delegate most of the responsibility for administration of public housing to PHAs and would have eliminated statutory authority for HUD’s current regulations requiring the Department to go through and review all its public housing regulations and re-issue them individually. If one tracks the various versions of the legislation, however, it appears that the final version of Title V was significantly moderated from the more drastic changes advocated in the earlier versions with regard to transferring most of the responsibility for administration of public housing to local governments and PHAs. In many ways, the final legislation resembles HUD’s own version of its restructuring of public housing that continued HUD’s authority to dictate much of what PHAs must do in administering this program.

4. Committee Report (emphasis added). As stated in H.R. 4194, § 502(b)(1) and (2) as to the Act’s objectives of “deregulating and decontrolling public housing agencies, thereby enabling them to perform as property and asset managers . . . [and] providing for more flexible use of Federal assistance to public housing agencies. . . .”

5. Committee Report (emphasis added). As stated in H.R. 4194, § 501(a)(5)(C), interests of low-income persons, and the public interest will best be served by a reformed public housing program that “vests in public housing agencies that perform well the maximum feasible authority, discretion, and control with appropriate accountability to public housing residents, localities, and the general public. . . .”

This issue has been a source of tension almost from the beginning, arising within a short time after enactment of this housing program in 1937.

During the last three decades, public housing has taken on an increasingly pejorative image following its initial conception as a bright hope for improving housing conditions for many lower-income citizens. Earlier viewed as affordable, safe, and secure housing for the working poor, access to which many lower middle-class families aspired, over the years it began to accumulate a tawdry reputation as a slum that consisted of racially segregated concentrations of the poorest in society forced to live in deteriorating high-rise projects that had literally become cesspools of crime and drug activity. Federal policies enacted in the early 1980s pressed public housing into use as housing of last resort, not only for the displaced but also for the homeless, increased its stigma, making it an unacceptable option for most—except for the few with no other choices.

Its operation, especially in large cities with high-rise family developments containing concentrations of families and individuals with social problems, became more and more problematic.⁶ Charges of patronage permeated assessments of management capability. Corruption was revealed in improper payments for construction and maintenance work, shakedowns of contractors, and the basis on which units were allocated to eligible tenants. These problems, and in some cases the actuality of bribes, shoddy construction, and inadequate maintenance, further reduced its attractiveness and discouraged anyone interested in public housing as a management career option except those dedicated to reversing these trends.

In the last fifteen years in order to protect the reputation of the predominant number of PHAs successfully operating their programs, HUD decided it needed to impose some measuring devices on PHA management, to focus on “troubled” PHAs and assertively to deregulate well-performing agencies. A series of federal assessment systems to evaluate and rank competency in handling various management functions evolved over time. These numerical characterizations were used to classify PHAs and to justify federal

6. See H.R. 4194, § 502(a)(3).

intervention to safeguard the appropriate use of the federal funds involved. In that respect, an Inspector General Office, reorganized with broader powers, was utilized to increase investigations of fraud, waste, and abuse, identify the most egregious examples of local misfeasance, and obtain repayment of ineligible and improper use of funds.

Certainly by the mid-1990s, drastic measures were seen as necessary to halt the downward spiral of this now fully stigmatized portion of the housing stock. Many perceived it would only be through fundamental changes in operations, management, and tenant populations that these conditions could be reversed and the units could once again provide attractive shelter opportunities for the working poor and lower middle-class for whom these programs were originally intended. The leaden hand of an entrenched and paternalistic federal bureaucracy, moreover, imposing anachronistic requirements that left little opportunity for local discretion in dealing with stubborn local problems, was also seen by many in local governments and in Congress as a major source of the problem.⁷ HUD had gained the reputation as an agency that could barely justify its continued existence.

In this context, it was not surprising that major initiatives were being proposed in Congress to change the program elements and administrative approaches that had spawned these problems and to attack the culture of poverty and crime that had become public housing's hallmark. The Clinton Administration also had been addressing some of the perceived problems of high-rise concentrations of socially problematic residents by encouraging spectacular demolitions of older projects and their replacement by mixed-income and mixed-financed developments that were cheaper to maintain. The demolitions reduced density and scattered concentrations of residents to other sites. Attacks on criminal activities by public housing residents were also increased through accelerated termination of tenancies and holding parents responsible for their children's criminal acts. Imposition of "One Strike And

7. See H.R. 4194, § 502(a)(4), "the federal method of overseeing every aspect of public housing by detailed and complex statutes and regulations has aggravated the problem and has placed excessive administrative burdens on public housing agencies. . . ."

You're Out" policies helped eliminate some of the worst offenders in existing projects.

Thus, Congress, the Clinton Administration, and industry trade groups had all been searching for alternative strategies to deal with a deeply flawed federal housing program. Out of this reassessment of the public housing program, one of the main strategies being considered was releasing local governments from the overly routinized requirements being imposed by federal administrators. Perhaps, local administrators left to deal with these problems and then held responsible for the results could make greater headway than the bifurcated federal-local system that made both inept and absolved each of ultimate responsibility for conditions that had occurred. The potential for a major devolution in responsibility by the federal to local governments seemed to be an integral part of earlier versions of the legislation that were developed by the Housing and Community Opportunity Subcommittee of the House of Representatives⁸ that started in earnest to revise public housing requirements in 1996 with the political changeover of that body.

In considering the reality of the devolution to local governments that Congress trumpeted in enacting the 1998 Act, however, one must be ever mindful of the old saying that he who supplies the money is ultimately likely to call the tune. The following discussion first touches on some of the changes made in the federal housing programs affected by this legislation and then assesses the extent to which federal devolution of responsibility to local governments for administration of public housing has actually occurred. Several processes Congress mandated in the 1998 Act requiring federal-local government interaction are also considered as indicators of the extent to which federal government dead-hand control is likely to continue: the negotiated rulemaking on critical decisions in allocating public housing funds, and the manner in which HUD implemented the local planning requirements mandated under the 1998 Act.

It is hard not to conclude that while such previously federally mandated matters as tenant eligibility, admissions policy, income calculations, tenant preferences, waiting lists, pet ownership, and

8. This is a subcommittee of the House Banking and Financial Services Committee.

rents charged can theoretically now be determined locally, the federal government rather than local governments still exercises fundamental control over administration of the public housing program. Local discretion continues to be substantially restricted. There may be some valid policy reasons for continued federal restrictions on local actions, but the issue is whether the controls on local administration go too far. This continuing federal power is exercised through a number of specific provisions in the legislation that provide the focus for this examination of what continues to be an over riding federal control of operation of public housing by local governments. Then, HUD's own implementing regulations have had their own impact by substantially retarding in some instances Congress' intent to expand PHA flexibility.

A. The Public Housing Landscape

Under the 1998 Act PHAs continue to be authorized to administer public housing programs on the local level, both in existing government-owned, operated, and funded public housing structures (the traditional public housing model) and also in units rented by tenants from private landlords with financial assistance supported with federal funds provided by PHAs. Federal funds provide a substantial portion of the private rentals paid by eligible tenants. A portion of a reasonable rent is paid by the PHA to the landlord and tenants also make a contribution to the landlord towards their rent computed as an applicable percentage of their household income. The latter program is inelegantly referred to as the Section 8 Existing Housing Program.⁹

These federally financed public housing programs provide housing for roughly three million low- and moderate-income families. The issue of whether public housing policy will be determined and administered federally, top down, or locally, bottom up, is one of fundamental importance in a federal system. In many ways, the federal-local tensions inherent in the relationship between levels of government that has been fashioned for the public housing system in the United States lie at the heart of the difficulties that over

9. United States Housing Act of 1937 § 8(o), 42 U.S.C. 1437f(o).

time often have been experienced in local operation of these federally funded housing programs. Obtaining continued funding for the program is dependent upon responsible administration of the program, which, in turn, requires some reasonable level of flexibility in local administration.

1. Horizontal Distribution of Access to Public Housing

In the United States, public housing serves only a portion of those eligible, for example, roughly 17%, about 3.9 million households, out of some 23.2 million in the 1990s who were classified as low income. This federally financed, locally managed government (not private) housing stock has been estimated to be worth over 90 billion dollars.¹⁰

2. Local Government Administration of Low-Rent Public Housing Units¹¹

Currently there are approximately 3,900 PHAs that manage this federally funded housing. Of these, 3,300 manage 1,345,000 housing units initially financed by federal construction subsidies and supported by continuing federal operating and capital funding for rehabilitation (formerly “modernization” grants) under the federal Low Rent Public Housing Program. Federal subsidies are necessary to cover most of the costs of operating and maintaining the dwelling units since rental income from the very low-income residents in these units is limited and, in any event, cannot exceed thirty percent of household adjusted annual income under applicable federal requirements.

PHAs are authorized under state laws and can be created by local governments, primarily municipalities (but including some counties), to carry out government housing functions in the locality. Most PHAs are small. Roughly 2,900 PHAs operate less than 500 housing units.

10. H.R. 4194, § 502(a)(2). This figure is clearly for replacement value since many of the high-rise projects would be unlikely to have significant value given their neighborhood locations, conditions of the buildings, and characteristics of the tenant populations.

11. The source of these statistics come from publications of the National Association of Housing and Redevelopment Officials.

An additional 400 PHAs administer between 500 and 3,000 units. The top eleven largest PHAs handle in excess of 10,000 units each. The New York City Housing Authority, by itself, manages over 156,000 units.

3. Elements of the Section 8 Program Using Private Rental Properties

In addition to the Low Rent Housing Program, PHAs also administer federal funds provided through a program called Section 8, named after the section of the Housing Act that created it. This program provides for payment of federal subsidies to cover market rents (in addition to tenant contributions) to private landlords whose units are rented to eligible tenants through PHAs. Tenants are not allowed to pay more than forty percent of their adjusted annual household income initially for their rent contribution. Thereafter, market demands may require even higher percentages so long as tenants remain in place. Another 2,100 PHAs manage 1,520,000 units under this Section 8 program.

4. Public Housing Funding Levels

Annual federal outlays over the last few years starting in fiscal year 1999 have been roughly \$2.8 billion for operating subsidies and \$3 billion for capital expenditures; the figures were \$3.1 billion and \$2.9 billion respectively for fiscal year 2000. In 2001 the proposed amounts are currently \$3.1 billion and \$2.8 billion.¹² Amounts for Section 8 certificates covering the merged programs proposed for fiscal year 2001 are roughly \$15 billion for rental payments to private landlords, some of it recaptured from prior year allocations.¹³

5. Public Housing Tenant Profiles

Current public housing resident profiles are of households in the bottom twenty percent of their community in income. Nationally, the

12. NAHRO MONITOR, May 31, 2000, Vol. XXII, No. 10, at 1-2.

13. NAHRO MONITOR, May 31, 2000, Vol. XXII, No. 10, at 1-2. This was an increase of almost \$5 billion over last year's appropriations.

average income is roughly \$7,300 annually, about half of the poverty level income. Families wait an average, of 13 months on PHA waiting lists for units. The length of residence in public housing is between 6 and 7 years on average, somewhat more than the generally applicable 5 year tenure in the general population before residents move. The average rent is about \$135 per month, representing 22% of the average public housing tenant household's income. Of total tenants, family households with children make up about 50%. Of these families, 73% are female headed and 78% are non-white. The other tenants are elderly (30%), and disabled (18%). Tenant rent contributions in the United States of 30% are high compared with under 20% that households average in many other countries in the world, leaving less resources for other necessities.

6. Local Political Nature of PHAs

PHAs are creatures of local governments, either state, regional, county, or municipal, even though their funding comes primarily from the federal government. Most, but not all, are independent of municipal governments, although many mayors in cities where state law has created an independent authority are still given power to appoint members of the Housing Commission that governs PHAs, meaning that local political considerations may still be at play.

II. EVALUATING THE 1998 ACT'S LEGISLATIVE CHANGES

Almost all of the following items are likely to be inherent in the design and management of a low rent public housing program. The distribution of responsibility for these issues can be allocated either to national or to local government depending upon the national objectives for providing these funds and the competencies and weaknesses of each that in a perfect world should determine which functions each should perform. In evaluating the following items, consideration should be given to the competencies and values that each level of government exercises. Then, one can better evaluate the significance of the devolution that Congress intended and subsequently that HUD actually put in place and what values provide the rationale for QHWA's handling of these items that were dealt

with by specific provisions in it. The items below do not include all the applicable provisions.

A. Tenant Interests Stressed

1. Tenant Participation Imposed

The 1998 Act requires that in most cases at least one recipient of housing services must serve on the PHA Board of Commissioners, its governing board. This makes mandatory what some state laws and many PHAs have already done, *i.e.*, include tenants on their Boards of Commissioners. This federal provision obviously imposes a limit on local administration and is binding on PHAs, limiting their discretion. Whether it is justified if maximum feasible local discretion is to be observed is the question. Ironically, however, in the past in some instances where HUD has acted to take over poorly performing PHAs, sometimes the first casualties are the tenants serving on the Board of Commissioners when HUD dismisses the Board and replaces them with a receiver, frequently a private contractor totally directed by HUD staff.

As discussed below, under requirements for a planning process that the 1998 Act imposed on PHAs, tenants now are also given an opportunity to respond to the five year and annual agency plans that PHAs must generate, which are subject to final HUD approval. Consideration of tenant concerns is only part of HUD's evaluation of the PHAs planning efforts. While HUD is often sensitive to resident interests, this should not imply that this means tenant concerns are paramount. Rather, physical inspections to determine conditions of units, fiscal responsibility exercised, and successful management operations, all as defined by HUD, are the primary consideration in the PHA's performance according to HUD's assessment criteria. Thus, while lip service is given to tenant interests and to understanding of what may affect them, HUD views its role more as a fiscal conservator of the bricks and mortar and proper use of federal funds rather than protector of tenant rights.

2. Tenant Rights to Pet Ownership

Under the 1998 Act PHAs are now required to give tenants the right to own and house in their own unit one or more common household pets, subject to reasonable requirements as published by the PHA and consistent with federal, state, and local laws and regulations. Previously, PHAs were not required to permit tenants to have pets, except in the case of the elderly and disabled who have enjoyed this right for well over a decade. So, Congress has decided that pets are of sufficient stature in the scope of things that all tenants have an absolute right to at least the common variety of them. Again, federal rights dictate local administration requirements. Probably, this is because pet ownership has been over the last several decades one of the most controversial rights of tenants. It has generated some of the most lively debate over management practices.

3. Families May Choose Either to Pay a Flat Unit Rent or a Rent Limited to Thirty Percent of Their Income

Families in public housing are now entitled to decide whether they would rather pay a reasonable flat rent for their unit set by the PHA or limit their rent payments to up to thirty percent of household income, a percentage applied uniformly by the PHA.¹⁴ Previously, tenants with higher incomes might have had to pay even more than the market rent for their unit. This provision permitting PHAs to set a flat rent was intended by the 1998 Act to remove previously existing federally imposed disincentives for families who gain employment and achieve self-sufficiency to remain in public housing and serve as role models. Tenants can choose the least expense rent option.

This approach provides PHAs greater flexibility in maintaining income protection for tenants while permitting families whose income is starting to rise from having to pay, as they have been required to in the past, a larger rental if thirty percent of their income were the only basis for setting rents. Congress' objective was to make

14. PHAs are to set "flat rent" based on fair market rents computed by HUD for each county, but these can be adjusted for various factors based on a reasonable rent in the specific circumstances test.

it easier financially for such tenants to remain in their public housing units, if they desired to do so. PHAs want to retain such tenants in their public housing complexes to provide greater stability, to act as role models, and to achieve a better income mix that can help generate more revenues than if higher income tenants move out and poorer tenants replace them. HUD regulations, however, do not allow PHAs to be reimbursed for flexible treatment of flat rents, somewhat inhibiting PHA flexibility.

4. Income of Welfare Recipients Who Become Employed Disregarded in Calculating Rent for Two Years

Any additional income generated by a former welfare recipient who goes back to work is ignored for twelve months in determining rent payments. Up to fifty percent is ignored for a second year, giving an incentive for them to seek work.

5. Tenants Permitted to Take Over Management Functions

Residents or non-profit resident management corporations are authorized to assume management responsibilities for their own projects. PHAs are authorized to contract with resident management corporations to manage individual projects. Experimental efforts in this regard started more than a decade ago, but it was not always easy for tenants to do so. First, HUD generally was skeptical of tenant capabilities so only a few management corporations actually succeeded in taking on such functions. Because PHA administrators often resist such incursions into their scope of authority, Congress has tried to provide a firmer basis for such tenant initiatives. In the end, the decision of whether or not to contract with tenants to carry out these functions is left to the PHA administrators, so that this federal authority for tenants to undertake such functions is not likely to be exercised very often. Not surprisingly, HUD seems rarely to have supported these efforts in any serious fashion in the past after the concept was championed by former Secretary of HUD, Jack Kemp, in the prior administration.

6. Minimum Rents of Up to Fifty Dollars Must Be Charged by PHAs

Congress directed that HUD require PHAs to charge at least a minimum rent of up to fifty dollars monthly to each resident household, regardless of income. The PHA determines the amount from zero dollars to fifty dollars. Hardship waivers are also provided for, however, subject to federal oversight. This minimal fee is equivalent in principle to the twenty-five dollars to fifty dollars minimum monthly rentals imposed by prior congressional legislation. Apparently an effort to satisfy fiscal conservatives in Congress, *i.e.*, there should be no free lunch, HUD's proposed implementing regulations have been criticized as confusing for tenants. This is another federally mandated restriction on local government discretion.

7. Income Increases from New Employment Excluded for Twelve Months

In order to encourage tenants to seek employment, Congress does not allow a PHA to calculate for purposes of setting rents any income from new employment for twelve months (so long as the period without employment exceeded four months). Further, only fifty percent of that income can be counted during the following year. Many PHAs actually find this relaxation of previous rigid federal standards on how rents must be calculated a refreshing change. Of course, in another sense, it is yet another mandate limiting PHA discretion. In addition, no adjustments for subsidy levels are provided to compensate PHAs for this consideration.

B. Flexibility for PHAs in Administration and Use of Funds

1. Flexibility Provided in Use of Capital Funds

Starting in fiscal year 2000, PHAs with more than 250 units will be able to use up to twenty percent of their capital grants for construction and modernization for operational expenses instead. PHAs with less than 250 units can use all of their capital funds for operations. Also, receipt of other income by PHAs generated, for

instance from investment earnings, will no longer decrease amounts available from the federal government that can be expended on operational costs. In the past, PHAs were penalized for such activities by loss of equivalent federal funds. Further, some demolition costs and remediation of environmental hazards as well as the amount of other non-federal funds used for construction will no longer count against calculation of cost caps for development that can limit the quality of construction and add to maintenance costs. This change was clearly an effort to free up the entrepreneurial spirit of PHAs and give local governments more leeway in handling their programs.

2. HUD Defines Adjusted Tenant Income for Rent Calculations

HUD is still authorized to set mandatory exclusions in determining tenant income, such as four hundred dollars for dependents, the costs of medical expenses especially for elderly and disabled persons, child care, a monetary allowance for minors in the household, along with exclusion of certain child support payments, spousal support payments, and earned income of minors. PHAs are provided limited authority to provide for other exclusions but with no increase in subsidy to support the decreased PHA income. Here, Congress has clearly limited local discretion, at least in imposing financial burdens on tenants. Consistency values prevail as does consideration of the impact on tenant income for other purposes.

3. PHAs Must Submit Acceptable Agency Plans

PHAs must provide HUD with a five-year plan and annual plans reflecting:

- a. Information on the housing needs of the locality;
- b. Population served;
- c. Method of rent determination;
- d. Operational procedures;
- e. Capital improvements needed;
- f. Unmet housing needs of eligible local families;
- g. Homeownership programs; and
- h. Efforts to coordinate housing programs with welfare agencies.

Resident Advisory Boards must be established and plans must be developed in consultation with the Advisory Board members. If PHAs and HUD take the process seriously, the work by PHAs can be extremely useful in helping formulate realistic local policies. Early indications, however, are that HUD, by only requiring adherence to a rather simplistic template in satisfying HUD review, does not intend to require that PHAs make realistic efforts to carry out their planning functions.¹⁵ One further problem with the template is that it provides a vehicle to impose further restrictions on PHA actions. For example, HUD has imposed a customer satisfaction practices survey incorporating other requirements from the controversial assessment system HUD has designed to rate PHAs. The process HUD has created forces PHAs back to HUD staff for clarification and approvals giving HUD the opportunity to impose its versions of what a PHA should do in running its program. Possibly HUD's approach is its anticipated inability to perform its review of the PHA plans within the mandatory seventy-five day period mandated by the statute. By only asking PHAs simply to check off alternative boxes rather than go through any process, HUD has demonstrated that it does not take these congressionally mandated requirements seriously. Thus, PHAs will not be required to effectively evaluate their local conditions or plan effectively for the future. In essence, this means local planning is likely to be formalistic and not real. Nor will a thorough factual grounding for local decisions be developed. Essentially HUD has nullified the federally mandated action, lowering any hurdles PHAs might otherwise have had to navigate.

15. A major change made by QHWRA is the requirement for all housing authorities to develop an Agency Plan. HUD was given responsibility to set forth the details and format. In fulfilling its responsibilities, HUD seems to have "dumbed down" the process by only asking a check off by PHAs to fill out their planning documents in the electronic template HUD has provided. HUD has taken away much if not all creativity that might have been required of a PHA to carry out the planning. The result is a "one size fits all" approach. Two examples are illustrative. For instance, HUD's template allows PHAs in developing a mission statement to adopt a generalized statement HUD has developed in lieu of the PHA fashioning its own statement. HUD has also provided its own versions of a PHA's goals and objectives that the PHA can adopt as their own rather than going through the important process of thinking through what they want to accomplish. HUD seems more interested in simplifying their own review process and data gathering rather than respecting the devolution thrust of the legislation.

4. PHAs to Set Up Eight-Hour Monthly Tenant Community Work Programs

In keeping with Congress' mandate that able-bodied, non-elderly adults who are not working or in a training program (and thus have minimal income) must make a contribution towards rent in the form of contributed services to the community, PHAs are to set forth how this obligation will be implemented and monitored. The condition was bitterly debated in Congress and illustrates that while federal requirements will be imposed on PHAs, HUD appears to be willing to allow PHAs to formulate flexible options to meet the congressional requirements.

5. Mandated Income Targeting

PHA economic viability and flexibility are significantly restricted by Congress' requirement that PHAs cannot fill more than 60% of their Low Rent Public Housing units with families whose incomes exceed 30% of area median income (AMI). The other 40% would have to be "very low income tenants." Concepts of income mixing and greater fiscal stability for PHAs that might like to attract higher income tenants have been sublimated to ensuring a federal objective that a significant portion of public housing units will still be reserved for the poorest families. Thus, tenants with incomes of up to 80% of AMI (considered "low income tenants") can be accommodated so long as they do not constitute more than 60% of the new admissions. By limiting those with higher incomes to "new admissions," Congress further restricted PHA flexibility in determining the populations they will serve. Existing tenants will be protected.

For the first time, however, admission requirements will differ between Section 8 and the traditional Low Rent Public Housing programs. In the case of Section 8 units, 75% of vouchers to tenants are to be reserved for those whose incomes do not exceed 30% of AMI, unless certain special circumstances apply. This means that federal requirements will be imposed on PHAs to require them to continue to provide for a substantial number of the poorest families in certain existing developments, but an even larger percentage of scattered site units must still be reserved for poorer families.

Local handling of admissions, therefore, still is subject to rather explicit federal requirements rather than allowing PHAs to think through admission policies and try to encourage income-mixing of residents. Moreover, all PHA admission policies continue to be subject to HUD review, a process that will leave significant potential for further federal dictation of admissions, as has been the case during much of the existence of the Low Rent Public Housing program. PHAs, however, are now fully authorized to offer incentives and priority to attract public safety officers who would be willing to move into and reside in units in public housing projects.

6. PHAs May Mortgage Their Properties Subject to HUD Approval

So long as no liability would be created for HUD, PHAs are given more flexibility in raising funds for new development. Such mortgages of existing properties could be used to generate funds for operating costs, to facilitate ultimate sale of units to residents, or to support new developments. This change distinctly improves PHA flexibility, but, of course, why should HUD care if its fiscal position is not directly effected. It will take effect only after federal regulations, yet to be proposed, are issued.

7. Federal Preferences for Tenants Repealed

While federal requirements that preference be given to persons living in substandard housing, paying more than fifty percent of income towards rent or who have been involuntarily displaced, were suspended by Congress during the last several years, all such federal preferences for admission have now been repealed under the 1998 Act. These federal requirements created a large influx of non-elderly disabled persons into projects for the elderly, causing considerable disruption for the remaining elderly tenants. These preferences were also a factor in lowering median income levels in the projects, putting some PHAs in a fiscal bind. PHAs can now determine whether they want to impose their own preferences. Section 8 owners from whom PHAs rent or provide vouchers for eligible tenants can also for the first time give preference to renting to employed persons.

In a recently published proposed rule on deconcentrating public housing, however, HUD seems intent on using its regulatory power to create new federal preferences by regulation. Applicants that fit criteria HUD prescribes will be exempted from the deconcentration requirements.¹⁶

8. Permanent Lease Provisions Repealed

The “endless leases” that HUD previously mandated PHAs use in the Section 8 program required cause for termination. Now leases can have a finite term and private owners can decline to renew a lease without regard to statutory causes for termination. These changes provide additional flexibility to PHAs in administering their programs. Tenants are to receive prior notice of termination of their rentals.

9. Requirements to “Take One Tenant Take All” Repealed

Provisions that had required owners of multifamily projects who leased a unit to one Section 8 voucher holder to accept all other eligible voucher holders who may apply to that project or any other property of the owner have been repealed. Obviously, such a provision discouraged owners from participating in the Section 8 program. This allows PHAs greater opportunities to place their tenants based on valid bases for landlords to select among tenants. Of course, racial or other prohibited discrimination cannot constitute such grounds.

10. Owners Must Consent in Advance to Law Enforcement Searches

If police have probable cause to believe criminal activity is occurring in common areas of a development, the owner is required as a condition of leasing units to federally supported tenants to give prior consent to searches by police. Another illustration of federal

16. The proposed regulation was published in the April 17, 2000 Federal Register, at vol. 65, No. 74, 20685-95. The final rule was issued on August 14, 2000 at vol. 65, No. 157, 49484-85.

reluctance to allow such decisions to be made by local governments rather than mandated top down.

11. Drug or Alcohol Dependence Not a Disability for Rental Preferences

Congress restricted drug or alcohol dependence as grounds for disability for admission preference purposes. What had been a restriction on local discretion is thus removed.

12. Owners of Section 8 Units and PHAs May Not Admit Registered Sex Offenders But Can Deny or Delay Admission of any Person Committing a Crime

If a crime has been committed by an applicant within a reasonable time of their request for admission, an owner may deny or at least delay admission if the crime would adversely affect the health or safety of other tenants or management. Such flexibility for private sector landlords can allow PHAs greater opportunities to place eligible tenants. Similarly, drug-related criminal activity can constitute grounds for eviction and disqualifies a tenant from re-admission for at least three years. The restriction on renting to sex offenders and allowing owners to reject tenants on the basis of commission of a crime actually increases owner flexibility and provides more discretion than in the past.

These requirements have been expanded by HUD regulations that force PHAs to evict current tenants who are on state “Megan Law” registers.

13. Occupancy of No More than Two Persons per Bedroom

This occupancy standard is made presumptively reasonable so as to avoid Fair Housing Act challenges, but the standard is subject to rebuttal on specific circumstances, such as, age of children and the capacity of building systems. HUD is prohibited from establishing any other national occupancy standard. This provision provides greater flexibility while clarifying a standard that was previously subject to a good deal of confusion.

14. PHAs Given Flexibility to Establish Site-Based Tenant Waiting Lists

Over the last several decades, HUD has required PHAs to maintain community-wide rather than specific project waiting lists. In areas where considerable racial segregation has occurred in certain projects, applicants were likely to have to go to the project with the most vacancies or were forced to integrate other segregated projects rather than taking a unit of their choice. The realities were that eligible applicants on the waiting list would choose to go back to the end of the line rather than have to move to a specific project they did not want to reside in. This Congressional change allows PHAs more flexibility in allocating units according to tenant preferences. Civil rights goals were probably not being achieved by the prior procedures anyway. Rather the process simply delayed most tenants from obtaining shelter other than in a disfavored project. HUD's regulations, however, appear to be resisting this flexibility by making approvals of site based waiting lists more onerous than community-wide lists.

15. Merger of Duplicative Housing Certificate and Voucher Programs

The prior Section 8 certificate and voucher programs, which had a historical basis but no justification for different procedures, were merged by the 1998 Act. The PHA may set local preferences for private landlords participating in the program based upon housing needs and priorities, but owners will be responsible for screening and selection of tenants within such parameters. PHAs may terminate contracts for rentals with owners who fail to evict disruptive tenants. These provisions extend PHA flexibility.

16. Administrative Fees Set for PHA Management of Section 8 Rentals

Previously, 7% of the grant amount was set aside and provided to the PHA for administering the Section 8 program. The 1998 Act increased this slightly to about 7.65%, even though private owners will be more involved in finding and approving tenants, relieving

PHAs of much of that burden. These funds can be used flexibly by PHAs, so this provision provides slightly more funds and enhances local discretion in their use.

17. Mixed Finance Projects Authorized

In order to facilitate greater income mix in projects, PHAs may now finance projects with private entities while utilizing federal public housing funds in the same project. Projects can, thus, include both market rate and public housing eligible tenants in these units. Investment may include loans, grants, guarantees, or other forms of investment. Another step in increasing local flexibility in administration.

18. Home Rule Demonstration

While HUD powers to deal with substandard-performing PHAs were increased, local governments can now ask HUD for home rule flexibility options to take over management of public housing within their jurisdiction. Obviously such an option for local governments is quite threatening to all but high-performing PHAs. The threat, however, was largely blunted by giving HUD authority to decide which, if any, underperforming PHAs would be subject to such action and whether to anoint the local government to act on behalf of the PHA. The demonstration would only be available for up to one hundred jurisdictions. PHAs, being mostly independent of municipal governments, were strongly opposed to throwing them more directly into the local political tempest.

Since HUD would enter into the performance agreements with local governments, some claim this would increase the potential for local politicization of public housing management as a source of patronage. However, most local governments are unlikely to use this opportunity given the significant road blocks HUD could impose were any mayor so reckless as to undertake such a project where others had failed miserably. Flexibility without real meaning could be one comment on this provision, earlier an extremely controversial one.

*C. Federal-Local Government Impacts of Consolidation of
Categorical Grants into Block Grant Funds*

A number of individual categorical grant programs, such as modernization and comprehensive grants, were merged under the 1998 Act into two funds: Operating and Capital. In turn, allocation of the funds was subject to a Negotiated Rulemaking process discussed below. Congress also mandated that formulas for allocation include a factor to reward superior performance by PHAs based on HUD's Public Housing Assessment System performance assessments. The consolidation itself allows HUD to concentrate on fewer pots of funds, making the federal controls and restrictions potentially more significant. However, as discussed below, the actual impact on PHAs was relatively responsibly dealt with by participants during the "Neg-Reg" process itself. The only risk is that the specific amounts previously appropriated to each of the individual funds now consolidated could be more easily reduced when only one amount needs to be cut. This actually occurred in the case of the Operating Funds for fiscal year 2000, thereby partly frustrating the interim negotiated consensus PHAs had reached with HUD.¹⁷

1. The Consolidated Funds

a. The Operating Fund

The amount of funds for 2000, as noted above, was \$3.1 billion. In future years, it will be "such sums as may be appropriated annually." The issues for the rulemaking were on what basis will the funds be distributed as between PHAs and based on what criteria.

b. The Capital Fund

This fund is used for construction and modernization of units. Again, its allocation was the subject of a negotiated rulemaking between HUD and local government PHAs. The amount for 1999 was \$2.9 billion and thereafter will be "such sums as may be

17. See *infra* note 18 and accompanying text.

appropriated annually.” Given that finite amounts are involved in both instances, *i.e.*, the amount of the appropriation for a given fiscal year, it would appear to be in HUD’s benefit for a variety of reasons that local government recipients develop agreements among themselves on the basis for the allocation, unless obvious unfairness occurs requiring HUD’s intervention.

2. The HUD-Local Government Negotiated Rulemaking Experience

QHWRA mandated that HUD develop three implementing rules using the negotiated rulemaking process. This “Neg-Reg” process has been used successfully for years by some federal agencies; however, HUD has shown relatively little interest in it.

a. HUD’s Initial Experience in Two Earlier Neg-Regs Had Been Positive

Following Congress’ instructions HUD’s first negotiated rulemaking took place in 1995. It involved the theretofore controversial “Vacancy Rule” that governs how vacant units would be counted for generating public housing operating subsidy funds to be allocated to PHAs for purposes of distributing appropriated funds under HUD’s Performance Funding System (PFS) regulations (24 CFR Part 990). Congress had provided that no changes could be made to the PFS regulations, except through such a negotiated rulemaking process. To the astonishment of many at HUD and those in PHAs as well, the rule was cooperatively negotiated and drafted within a few days. The proposed rule that resulted generated almost no public criticism.

Despite the relative ease of that process, HUD’s second effort to utilize Neg-Reg procedures also occurred only after statutory direction to do so. This process involved a much broader and more complex subject matter: implementation of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). This rulemaking, reflecting the inherently difficult nature of the task and the not always happy relationship between HUD and Indian tribes, was arduous but nonetheless was ultimately viewed by participants as successful.

b. The QHWRA Neg-Regs

Congress required three separate Neg-Regs by HUD in the 1998 QHWRA legislation. All involve the development of a formula for allocation of HUD funding to PHAs. The first required determining use of funds for renewals of Section 8 Annual Contributions Contracts between PHAs and private sector providers of tenant-based rental assistance. The second and third were to determine the distribution of funding to PHAs from newly created Public Housing Operating and Capital Funds created by Section 519 of the QHWRA. The first sets out how federal funds will be allocated by deciding what operating expenses for PHAs will qualify and in what amounts. This decision directly affects individual PHA current budgets and operations. The second negotiation determines general standards that will result in allocations of available funds to individual PHAs for construction and rehabilitation projects.

Final action from these rulemakings was not expected to be completed until late Spring 2000.¹⁸ Some observers have commented that the success of each of the committees appointed to participate in the Neg-Reg has varied widely. The negotiation process of the Section 8 funding allocation rule was the least difficult. The Operating Fund Rule was the most problematical. To the extent such a perception is accurate, it may reflect, like the earlier Native American negotiations, the complexity of the subject matter. It is also true that the Operating Fund Neg-Reg got off to a rocky start.

18. An interim rule was not expected to be published until late Spring. The Operating Fund Neg-Reg, while reaching an interim consensus, clearly needed more accurate data than currently available regarding a number of integral considerations in devising a distribution formula that would make sense to all PHAs. A study was proposed by an outside institution. The actual expense levels vary considerably among PHAs, depending upon size. In particular, PHAs with five hundred or less units tend to have relatively low expenses, especially compared to larger ones in urban centers with concentrations of residents with aggravated social problems. Costs for resident participation, which can be sizeable in many PHAs, was to be included in budget requests to Congress by HUD, although because of the timing of the agreement, it came late in the budget cycle for that year and was not included in the 2001 budget request. *See* NAHRO MONITOR, Dec. 15, 1999, Vol. XXI, No. 23 at 1-2.

c. Issues Arising out of the Operating Fund Neg-Reg

Shortly before the commencement of this Neg-Reg, three industry groups that were to participate on the Neg-Reg Committee representing PHAs filed suit against HUD on an unrelated matter in the United States District Court for the District of Columbia. The organizations claimed that in issuing a separate rule used for assessing performance of PHAs, HUD had not followed proper Administrative Procedures Act (APA) rulemaking procedures.

HUD's issuance of its new assessment system, the Public Housing Assessment System (PHAS) with a shortened notice and comment period, was seen by PHAs as unfairly vague, allowing HUD to apply undisclosed criteria by which they would be judged. The suit asked for temporary relief, alleging in general that the notice and comment provisions of the APA and HUD's own "Rule on Rules" had not been complied with and that the rule itself was insufficiently detailed to provide adequate guidance to PHAs.

HUD's extrajudicial response to this challenge was to deliver a letter "requesting" that representatives of the three plaintiffs withdraw from the Neg-Reg Committee because of a conflict of interest as a result of the pending PHAS litigation. The letter was accompanied by verbal statements that HUD would have no choice but to adjourn or terminate the Neg-Reg if representatives of the plaintiff organizations continued to participate. While the suit involved the PHAS assessment criteria, HUD claimed the conflict of interest arose because the criteria might involve the same subject matters dealt with in the operating fund negotiations. HUD reasoned that since Congress required the operating fund formula to reflect grantee performance and since performance would be measured by the regimen contained in the PHAS rule, the three plaintiff organizations could not properly participate in a negotiation process involving a good faith effort to reach a consensus. The delivery of HUD's letter was bolstered by statements on the part of the Facilitator of the Operating Fund Neg-Reg, expressing the legal conclusion that HUD could terminate or adjourn the rulemaking any time it wished.

Faced with scuttling the Neg-Reg process if they refused to do so, the industry groups stepped aside, although since the proceedings

were public they could not be prevented from at least attending. The suit was subsequently settled and dismissed involving the PHAS rule. The three industry organizations were then permitted to rejoin the Neg-Reg proceedings without HUD objection.

This incident, in addition to consuming more than a day of the committee's time and poisoning the negotiating atmosphere, raised important legal questions. Neg-Regs proceed simultaneously under two statutes: the Negotiated Rulemaking Act of 1990¹⁹ and the Federal Advisory Committee Act.²⁰ The former, in section 565(a)(1), provides that in establishing and administering a negotiated rulemaking committee, a federal agency "shall comply with the Federal Advisory Committee Act with respect to such committee, except as otherwise provided in this subchapter."

Section 10(e) of the FACA allows federal government representatives on an advisory committee to adjourn any meeting if they determine such action to be in the public interest. The FACA also provides that no advisory committee meetings are to proceed without the participation of federal government representatives. The Neg-Reg Act, on the other hand, states in section 566(b) that the federal government's representative on a negotiated rulemaking committee "shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee. . . ." Moreover, federal agencies are not permitted to terminate a Neg-Reg committee before the completion of a rule or the time provided in its charter without first "consulting" with the committee.²¹ Neither Act says anything about removal from committees.

A negotiated rulemaking committee is a special kind of federal advisory committee—one in which the federal agency occupies a position as a negotiating partner. Although the product of its labors consists only of a "recommended" rule, the Neg-Reg Act provides that a federal agency "to the maximum extent possible consistent with [its] legal obligations, will use the consensus of the committee as the basis for the rule proposed by the agency for notice and

19. Neg-Reg Act, 5 U.S.C. § 561 *et seq.*

20. FACA, 5 U.S.C. App.

21. Neg-Reg Act § 567.

comment.” Moreover, where the negotiated rulemaking is *mandated by statute*, that is a special kind of rulemaking. Whether federal agencies possess the power to remove members or to adjourn or terminate negotiated rulemaking proceedings without prior consultation where such a Neg-Reg was specified by Congress requires clarification for future proceedings using this mode of rulemaking.

Another critical issue that arose out of the Operating Fund neg-reg regarding distribution of federal financial assistance to PHAs for operation and management of public housing was that the negotiating committee determined that sufficient data did not exist on the actual costs of operating PHAs to make some of the decisions necessary and that a cost study should be performed. While an interim approach to the distribution was formulated, a cost study was requested and a subsequent line item appropriation in the 2000 appropriations bill by Congress has authorized funding for the study by the Harvard University Graduate School of Design.

In 1975 a performance funding system was developed that tried to set allowable expense levels applicable to all PHAs, whether of the size of New York City’s 150,000 plus units or of a small town thirty unit PHA. Clearly one standard for expenditures required was not workable. Due to be completed by the end of 2001, the study will incorporate such considerations as PHA missions, applicable standards in achieving such missions, the basis for comparisons between PHAs, distinctions and differences in operating costs between managing private and public housing, and issues of funding methods.²²

III. CONCLUSION

In simply looking at the number of mandatory elements of the 1998 Act as it pertained to PHAs, it should be apparent that Congress, particularly the House and Senate Appropriations Committees to whom the final decisions were left, felt obligated to continue to impose federal mandates on a substantial portion of the operation of public housing by PHAs. Of the some twenty-five items

22. See NAHRO MONITOR, Apr. 30, 2000, Vol. XXII, No. 8, at 7-8.

in the 1998 Act dealing with administration of public housing examined in this analysis, roughly half still involve federally-imposed restrictions on how public housing should be managed by PHAs. Clearly, a number of values other than maximum feasible management flexibility for PHAs are at play.

Such considerations as tenant rights and involvement in management and giving those on welfare incentives to work, are some examples of other considerations Congress felt needed to be incorporated. Similarly, a number of fiscal requirements that impact on management decisions have also been continued. These are understandable values.

A related issue is how HUD has implemented the applicable provisions. While HUD was restricted in continuing to control PHA management in a number of regards, early appraisals of how HUD regulations and practices adopted after the 1998 Act have dealt with PHAs suggest that paternalistic practices are creeping back into the relationship between federal administrators and PHAs.²³ Some opportunities have been lost, as well. The potential for stimulating much more thoughtful planning by PHAs with respect to their particular goals, objectives, and conditions, at least at the onset, has been undermined by HUD's over-simplification of the planning process requirements. What occurred is but another version of paternalism, reflecting a lack of confidence that PHAs could actually perform the planning functions.

In other regards, it appears to have been difficult for HUD staff to keep their own personal approaches to PHA management out of the

23. One continuing vehicle for exercise of control by HUD is the LOCCS system used by HUD actually to release funds not only committed to specific PHAs and held in the U.S. Treasury, and only after actually invoices for payment have been submitted by contractors and formally approved through the applicable PHA procedures for processing vendor payments. Until HUD personnel specifically release requested funds through this computerized system for cash management, the funds are unavailable to the PHA. The impact can be serious in terms of a PHA's ability to meet its commitments. PHAs are prevented from drawing down funds other than those required to operate for a short period, sometimes days, and often not until vendor invoices have been received. The leverage inherent in the ability to withhold some funds until compliant action on even unrelated matters is obtained from PHA administrators should not be underestimated. HUD Field Office staff can simply hold up funds with little or no options in the way of alternatives for PHAs except for interim compliance with what is demanded by HUD staff. These low visibility actions by HUD staff, therefore, are a potent weapon for imposing their decisions on PHA operations.

implementing regulations, even if indirectly. Old habits die hard. This appears to be true with regard to HUD's handling of the Neg-Reg process, in particular. An excessive desire to control the process, rather than a cooperative effort to work to resolve problems, seemed to distinguish how HUD handled its role. Attempts to exclude clearly necessary participants because they challenged HUD in other matters seemed petty to the outside observer. Similarly, there appears to have been a far more contentious flavor to the proceedings than should have occurred. Since the issues involved were essentially dividing a limited pie (annual grant funds) among applicants, it would appear that HUD's role should have been more that of ensuring that all interests were considered and treated fairly rather than attempting to dictate desired results.

This evaluation of how the federal government has actually implemented its devolution despite the rhetoric on the subject illustrates how difficult it can be to discontinue ingrained habits of controlling others.²⁴ That use of federal funds are at issue, has

24. See A Report by a Panel of the National Academy of Public Administration for Congress and the Department of Housing and Urban Development., *Interim Report: Evaluating Methods for Monitoring and Improving HUD-Assisted Housing Programs, June 2000*. The draft findings issued July 31, 2000, state at p.2, that "HUD's current monitoring and oversight systems have significant deficiencies that must be remedied." The Report notes at p.3, "HUD's assessment system is not the product of a strongly consultative culture. . . PIH's culture, which as evolved over many years, does not foster effective consultation with partners and stakeholders." The Report's recommendations include, at p.4: "Modify the current system [for monitoring and overseeing affordable housing programs] . . . to ensure accountable performance by housing providers without excessive oversight or intervention in housing providers' operations. The system should be adopted to measure outcomes which HUD and its private and public partners agree on."

Devolution is clearly understood to be a primary objective for HUD as set forth in the Report's recommendation language, at p.6:

The objective should be to transfer to state and local housing agencies and elected officials substantial flexibility and discretion over the use of funds for legislatively authorized purposes. those officials should be held accountable for meeting performance goals through their own political processes and through streamlined HUD monitoring and oversight mechanisms.

Its current problems and the importance of making these changes in HUD's existing culture is reflected in the following language from the Report's recommendations, at p.7:

Modify the organizational culture in HUD to foster better collaboration between the department and its housing partners. HUD should transform its organizational culture and normal way of doing business into one that relies much more heavily on consultation and collaboration with its stakeholders. Regulation and enforcement,

provided more than ample justification for federal administrators to impose controls. Whether new consultative and collaborative norms will prevail is the issue.

Congress, moreover, demonstrated it was just as likely to emphasize concerns over financial management issues despite assertions of devolving responsibility to local governments. That such controls on local flexibility have continued to be imposed amply serves to illustrate the inherent conflicts generated when multiple government levels' are involved in a particular governmental function, such as housing assistance.

While a shared government role in provision and management of housing has been almost universally accepted at all levels of government, the difficulty posed by continued federal resistance to allowing local governments significant discretion in using federal funds undermines the independence sought for PHAs if they are to be held truly accountable for how they carry out their responsibilities. It is unfair to ask that local governments fashion solutions to their own local housing problems if federal administrators continue to impose rigid administrative requirements on them and constantly second guess every decision. Worse, imposing uniform requirements without regard to local circumstances may well condemn governments' housing role to failure in the long run, especially given the potential when problems arise on blaming the other level of government for hindering solutions to the problems..

Local governments are closer to those receiving these services and they should generally be given the responsibility for handling the task, subject only to federal review for waste, fraud and abuse, or failure to comply with civil rights protections or observe essential tenant interests. At least, the changes realized through the 1998 Act are a start, and perhaps the federal government will become more comfortable after building on these initial steps with giving local governments more authority along with the responsibility to perform.

although necessary, should not be the routine way of conducting day-to-day business. Voluntary compliance with generally accepted goals and standards should be the norm. Gaining general acceptance for its modified assessment system will require far more consultation and collaboration in developing the goals, standards, performance measures, regulations, and assessment protocols than HUD has practiced in the past.