

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 941

[Docket No. FR-4489-P-01]

RIN 2577-AC05

### Public Housing Total Development Cost

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend HUD's regulations governing Total Development Cost (TDC) for the development of public housing. The amendments would implement statutory changes made to the statutory TDC requirements. Among other changes, this proposed rule would limit the amount of public housing funds that a public housing agency may use to pay for housing construction costs. The rule would also provide that demolition and environmental hazard remediation costs are included in TDC only to the extent that such costs are associated with the replacement of public housing units on the project site.

**DATES:** *Comments Due Date:* March 5, 2001.

**ADDRESSES:** Interested persons are invited to submit written comments regarding this proposed rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address. Facsimile (FAX) comments will not be accepted.

**FOR FURTHER INFORMATION CONTACT:** William Flood, Office of Public and Indian Housing, Room 4134, U.S. Department of Housing and Urban Development, 451 Seventh St., SW., Washington, DC 20410; telephone (202) 708-1640 (this is not a toll-free telephone number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

#### SUPPLEMENTARY INFORMATION:

#### I. Statutory Background

The United States Housing Act (42 U.S.C. 1437 *et seq.*) (the 1937 Act) establishes the statutory framework for

HUD's public and assisted housing programs. The 1937 Act authorizes HUD to assist public housing agencies (PHAs) with the development and operation of public housing projects, and sets forth several requirements regarding public housing development. Two such statutory requirements regarding the development of public housing are found in sections 3(c)(1) and 6(b) of the 1937 Act.

Section 3(c)(1) of the 1937 Act (42 U.S.C. 1437a(c)(1)) defines the terms "development" and "development cost." Specifically, section 3(c)(1) defines development to mean "any and all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a" public housing project. Further, section 3(c)(1) specifies that development cost "comprises the costs incurred by a [PHA] in such undertakings and their necessary financing (including the payment of carrying charges), and in otherwise carrying out the development of" the public housing project.

Section 6(b)(1) of the 1937 Act (42 U.S.C. 1437d(b)(1)) limits the amount of public housing funds provided by HUD that a PHA may use to pay for the costs of developing a public housing project, unless HUD provides otherwise. (For purposes of this preamble, the term "public housing funds" includes public housing Capital Funds, public housing development funds, modernization funds converted to development purposes, and HOPE VI program funds.)

Section 6(b)(2) of the 1937 Act (42 U.S.C. 1437d(b)(2)) directs HUD to determine total development cost by multiplying the "construction cost guideline" for the project "by averaging the current construction costs, as listed in not less than two nationally recognized residential construction cost indices, for publicly bid construction of a good and sound quality." The construction cost guideline is then multiplied by 1.6 for elevator type structures and by 1.75 for non-elevator construction. The statutory total development cost (TDC) limit is calculated by adding the resulting amounts for all units in the public housing project.

#### II. Public Housing Reform

On October 21, 1998, President Clinton signed into law HUD's fiscal year (FY) 1999 Appropriations Act, which includes the Quality Housing and Work Responsibility Act of 1998 (title V of the FY 1999 HUD Appropriations Act; Public Law 105-276; 112 Stat. 2461) (referred to in this preamble as the "Public Housing Reform Act"). The

Public Housing Reform Act constitutes a substantial overhaul of HUD's public housing and Section 8 assistance programs. The Public Housing Reform Act enacts into law many of the reforms originally proposed in Secretary Andrew Cuomo's HUD 2020 Management Reform Plan, HUD's public housing bill and Congressional bills that are directed at revitalizing and improving HUD's public housing and Section 8 tenant-based programs.

Section 520 of the Public Housing Reform Act (entitled "Total Development Costs") makes three revisions to the public housing development requirements set forth in the 1937 Act. First, section 520(a) amends the statutory definition of "development cost" to specify that such cost "does not include the costs associated with demolition of or remediation of environmental hazards associated with public housing units that will not be replaced on the project site, or other extraordinary site costs as determined by the Secretary" of HUD.

Section 520(b) of the Public Housing Reform Act amends section 6(b) of the 1937 Act to provide that the statutory TDC limit applies only to public housing funds provided by HUD for use in the development of public housing, and does not apply to other funding—such as funding under the HOME Investment Partnerships Program or funding under the Community Development Block Grants (CDBG) Program.

Section 520(b) also provides that HUD may limit the amount of public housing funds that a PHA may use to pay for housing construction costs, including "the actual hard costs for the construction of units, builder's overhead and profit, utilities from the street, and finish landscaping."

#### III. This Proposed Rule

HUD's regulations implementing the public housing development requirements of the 1937 Act are located at 24 CFR part 941. This proposed rule would update part 941 and incorporate the statutory amendments made by section 520 of the Public Housing Reform Act. The following summarizes the major amendments that would be made to part 941 by this proposed rule:

##### A. Amendments to the Definition of TDC (§ 941.103)

1. *TDC sub-allocations.* In order to better understand and control the actual costs involved in the development of a project, the proposed rule would amend the definition of TDC in § 941.103 to provide that the maximum TDC allocation consists of two sub-

allocations: housing construction costs and community renewal costs. This will enable HUD to identify the actual costs associated with the different aspects of the whole development program.

Housing construction costs are the costs allocated to construct the dwelling units. The proposed rule would define the TDC housing construction sub-allocation to include costs attributable to:

- Dwelling unit hard costs (including construction and equipment);
- Builder's overhead and profit;
- On site streets and utilities from the street;
- Finish landscaping; and
- Davis-Bacon wage rates, as applicable.

Community renewal costs are the balance of the development costs remaining within the TDC limit after the housing construction cost allocation is subtracted from the TDC limit. Community renewal costs include the costs allocated to renewal of the community, as well as certain other costs associated with the development of the public housing project. The proposed rule would define the community renewal sub-allocation to include costs attributable to:

- Planning (including proposal preparation);
- Administration;
- Site acquisition;
- Relocation;
- Demolition and site remediation of environmental hazards associated with public housing units that will be replaced on the project site;
- Interest and carrying charges;
- Off-site facilities;
- Community buildings and other HUD-approved non-dwelling facilities;
- A contingency allowance;
- Insurance premiums; and
- Any initial operating deficit.

2. *Demolition and site remediation costs.* The proposed rule would revise the definition of TDC to provide that demolition and site remediation costs are included in TDC only to the extent that such costs are associated with the development of public housing units on the project site.

3. *Extraordinary site costs.* In accordance with section 520 of the Public Housing Reform Act, the proposed rule would also specify that extraordinary site costs as approved by HUD are not included in TDC. The proposed rule provides that extraordinary site costs may include, but are not limited to: (1) removal or replacement of extensive underground utility systems; (2) extensive rock and/or soil removal and replacement; (3) construction of extensive street and

other public improvements; and (4) dealing with unusual site conditions such as slopes, terraces, water catchments, and lakes. The proposed rule would require that extraordinary site costs be verified by an independent certified engineer and approved by HUD.

4. *TDC limit for purposes of the Annual Contributions Contract.* Currently, the definition of TDC in § 941.103 contains the following provision:

The total development cost in the proposal, when reviewed and approved by HUD, becomes the maximum total development cost stated in the ACC. Upon completion of the project, the actual development cost is determined, and this becomes the maximum total development cost of the project for purposes of the ACC.

For purposes of clarity, this proposed rule would relocate this provision to § 941.306, which sets forth the maximum development cost requirements for public housing development.

#### *B. Amendments to Maximum Development Cost Requirements (§ 941.306)*

The proposed rule would entirely revise § 941.306, which establishes the maximum development cost requirements. The following summarizes the major changes that would be made to § 941.306 by this proposed rule:

1. *Exceptions to TDC limit.* Section 6(b) of the 1937 Act permits the Secretary of HUD to approve development costs higher than the TDC for a public housing project. Section 941.306(a) describes the conditions under which the Secretary would approve an exception to the TDC. HUD has recently undertaken an intensive process of analysis and consultation to establish appropriate cost limits and, therefore, does not foresee circumstances under which an exception would be warranted. Accordingly, this proposed rule would remove the regulatory language regarding exceptions to the TDC limits.

2. *Elaboration of TDC calculation procedures.* Currently, § 941.306(b) provides that "HUD will determine the maximum \* \* \* TDC in accordance with section 6 of the" 1937 Act. For the convenience of readers, this proposed rule would revise § 941.306(b) to provide greater detail regarding the procedures used by HUD in determining the TDC for a public housing project.

In Senate colloquy before passage of the Public Housing Reform Act, Senator Mack noted that HUD "should interpret [section 6(b)(2) of the 1937 Act] as

requiring the use of indices such as the R.S. Means cost index for construction of 'average' quality and the Marshall & Swift cost index for construction of 'good' quality" (Congressional Record of October 8, 1998, S. 11840). Accordingly, the proposed rule would also specify that HUD will be using these two indices to calculate TDC. HUD has the discretion to change the cost indices to other such indices which reflect comparable housing construction quality.

3. *Limit on housing construction costs.* In accordance with section 520 of the Public Housing Reform Act, HUD has decided to limit the amount of public housing funds that a PHA may use to pay for housing construction costs.

HUD will determine the limit on housing construction costs by averaging the housing construction costs listed in at least two nationally recognized residential housing construction cost indices for specific bedroom sizes and structure types. This formula is the same as that used in determining the project TDC, with the exception that the multipliers (for elevator type structures and non-elevator type structures) are not applied to the average of the two construction indices. HUD will use the R.S. Means cost index for construction of "average" quality and the Marshall & Swift cost index for construction of "good" quality to calculate the limit on housing construction costs (HUD has the discretion to change the cost indices to other such indices which reflect comparable housing construction quality). The balance of the public housing funds provided by HUD for the development of the project (up to the maximum TDC allocation) may be used to pay for community renewal costs.

4. *TDC applicability to public housing funds.* The proposed rule clarifies that the TDC limit applies only to costs paid from public housing funds provided by HUD to a PHA for use in the development of public housing. As provided in section 520 of the Public Housing Reform Act, the TDC limit does not apply to other funding provided by HUD to a PHA. A PHA may use funding sources not subject to the maximum TDC limitation (such as CDBG funds, HOME funds, low-income tax credits, private donations, and private financing) to cover project costs that exceed the housing cost cap or the maximum TDC amount.

#### **IV. Findings and Certifications**

##### *Regulatory Planning and Review*

The Office of Management and Budget (OMB) reviewed this rule under

Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this rule is a “significant regulatory action” as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Department’s Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

#### *Environmental Impact*

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

#### *Federalism Impact*

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

#### *Regulatory Flexibility Act*

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

(1) *A Substantial Number of Small Entities Will Not Be Affected.* The proposed rule is exclusively concerned with public housing agencies that receive capital assistance provided by HUD for the development of public housing. The proposed rule would update HUD’s public housing development regulations at 24 CFR part 941 to incorporate the statutory amendments made by section 520 of the

Public Housing Reform Act. Under the definition of “Small governmental jurisdiction” in section 601(5) of the RFA, the provisions of the RFA are applicable only to those few public housing agencies that are part of a political jurisdiction with a population of under 50,000 persons. The number of entities potentially affected by this rule is therefore not substantial.

(2) *No Significant Economic Impact.* The proposed regulatory amendments will not change the amount of capital funding available to public housing agencies for the development of public housing. Accordingly, the economic impact of this rule will not be significant, and it will not affect a substantial number of small entities. Notwithstanding HUD’s determination that this rule will not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD’s objectives as described in this preamble.

#### *Unfunded Mandates Reform Act*

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

#### **List of Subjects in 24 CFR Part 941**

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

For the reasons stated in the preamble, HUD proposes to amend 24 CFR part 941 as follows:

#### **PART 941—PUBLIC HOUSING DEVELOPMENT**

1. The authority citation for 24 CFR part 941 continues to read as follows:

**Authority:** 42 U.S.C. 1437b, 1437c, 1437g, and 3535(d).

2. Revise § 941.102(b)(3) to read as follows:

#### **§ 941.102 Development methods and funding.**

\* \* \* \* \*

(b) \* \* \*

(3) Funds available to it from any other source, consistent with

§ 941.306(e), or as may be otherwise approved by HUD.

\* \* \* \* \*

3. In § 941.103 revise the definition of “*Total development cost (TDC)*” to read as follows:

#### **§ 941.103 Definitions.**

\* \* \* \* \*

*Total Development Cost (TDC).* (1)

The sum of all HUD-approved:

(i) Housing construction costs (as defined in paragraph (2) of this definition); and

(ii) Community renewal costs (as defined in paragraph (3) of this definition).

(2) Housing construction costs are the development costs attributable to:

(i) The dwelling unit hard costs (including construction and equipment);

(ii) Builder’s overhead and profit;

(iii) On-site streets and utilities from the street;

(iv) Finish landscaping;

(v) Davis-Bacon wage rates, as applicable.

(3) Community renewal costs are the development costs attributable to:

(i) Planning (including proposal preparation);

(ii) Administration;

(iii) Site acquisition;

(iv) Relocation;

(v) Demolition and site remediation of environmental hazards associated with public housing units that will be replaced on the project site;

(vi) Interest and carrying charges;

(vii) Off-site facilities;

(viii) Community buildings and non-dwelling facilities;

(ix) A contingency allowance;

(x) Insurance premiums; and

(xi) Any initial operating deficit.

(4) TDC does not include

extraordinary site costs, or demolition

or environmental remediation costs

associated with public housing units

that will not be replaced on the site.

Extraordinary site costs must be verified

by an independent certified engineer

and approved by HUD. Examples of

extraordinary site costs include, but are

not limited to:

(i) Removal or replacement of

extensive underground utility systems;

(ii) Extensive rock and/or soil removal

and replacement;

(iii) Construction of extensive street

and other public improvements; and

(iv) Dealing with unusual site

conditions such as slopes, terraces,

water catchments, lakes, etc.

\* \* \* \* \*

4. Revise § 941.306 to read as follows:

#### **§ 941.306 Maximum development cost.**

(a) *Limit on approved HUD funds to*

*TDC.* (1) No funds provided by HUD

under the Act or the HOPE VI program may be used to pay development costs in excess of the TDC.

(2) The total development cost in the proposal, when reviewed and approved by HUD, becomes the maximum TDC stated in the ACC. Upon completion of the project, the actual development cost is determined, and this becomes the maximum TDC of the project for purposes of the ACC.

(b) *Determination of maximum TDC.* HUD will determine the maximum TDC for a public housing project as follows:

(1) *Step 1: Unit construction cost guideline.* HUD will first determine the "construction cost guideline" for the project by averaging the current construction costs as listed in two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of "average" quality and the Marshal & Swift cost index for construction of "good" quality. HUD has the discretion to change the cost indices to other such indices which reflect comparable housing construction quality.

(2) *Step 2: Bedroom size and structure types.* The construction cost guideline is then multiplied by the number of units for each bedroom size and structure type.

(3) *Step 3: Elevator and non-elevator type structures.* HUD will then multiply

the resulting amounts from step 2 by 1.6 for elevator type structures and by 1.75 for non-elevator type structures.

(4) *Step 4: Maximum TDC.* The maximum TDC for a project is calculated by adding the resulting amounts from step 3 for all units in the project.

(c) *Limit on housing construction costs.* (1) *General.* As described in the definition of TDC in § 941.103, the maximum TDC allocation is composed of two sub-allocations: housing construction costs and community renewal costs. A PHA may not use funds provided by HUD under the Act to pay housing construction costs in excess of the "housing cost cap" established by HUD.

(2) *Determination of housing cost cap.* HUD will determine the housing cost cap by averaging the housing construction costs listed in at least two nationally recognized residential housing construction cost indices for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of "average" quality and the Marshal & Swift cost index for construction of "good" quality. HUD has the discretion to change the cost indices to other such indices which reflect comparable housing construction quality.

(3) *Balance of TDC allocation.* The balance of the funds provided by HUD under the Act for the development of the project (up to the maximum TDC

allocation) may be used to pay for community renewal costs.

(d) *Funds not subject to TDC limit.* (1) As noted in paragraph (a) of this section, the maximum TDC limit applies only to funds provided by HUD under the Act or the HOPE VI program to a PHA and used for the development of public housing.

(2) A PHA may use funding sources not subject to the maximum TDC limitation (such as CDBG funds, HOME funds, low-income tax credits, private donations, and private financing) to cover project costs that exceed the housing cost cap or the maximum TDC amount. The added funding, however, may not be used for items that would result in substantially increased operating, maintenance or replacement costs, and must meet the requirements of section 102 of the HUD Reform Act (42 U.S.C. 3545).

(3) Although certain funding sources are not subject to the TDC limitations or housing cost cap described in paragraphs (a) and (c) of this section, these funds must be included in the project development cost budget, and legally acceptable written commitments for such funds must be provided by the PHA for HUD approval.

Dated: December 8, 2000.

**Harold Lucas,**

*Assistant Secretary for Public and Indian Housing.*

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