

# Legal Interests & Issues in RAD Conversions



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## RAD 1 – Conversion Process

### 1. Strategic Planning

- What needs does your portfolio have?
- What assets and tools are available?
- Communication with residents and PHA board.

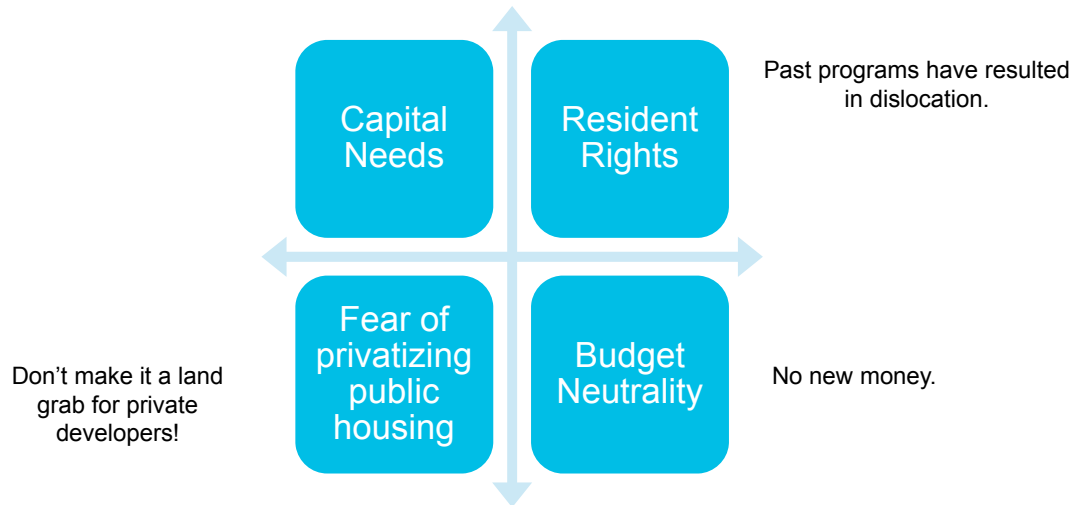
### 2. CHAP to RCC

- Commitment to enter into a HAP (CHAP) sets forth the project rents.
- Conduct Capital Needs Assessment (CNA)
- FHEO / Civil Rights Review
- Assemble Financing
- Environmental Review
- RAD Conversion Commitment (RCC) sets out terms & conditions for closing.

### 3. Closing & Conversion to Section 8

- Finalize the transaction & satisfy closing requirements.
- Enter into the Section 8 HAP Contract & other contract documents at closing.
- Resident transition – relocation? new management company? New leases.
- Logistics –PIC removal, IT Systems, file transfer, etc.

## Competing tensions in RAD legislation



## Key RAD Legal Issues for PHAs

1. **Complying with HUD guidance**
2. **Ownership / Control**
3. **Restrictive covenants to ensure long-term affordability**
4. **Contractual obligations**
5. **Title issues**

## 1. Complying with HUD Guidance

### **Public housing is public housing until Closing.**

- Continue compliance w/ public housing requirements.
- Administrative requirements (Annual Plan / Significant Amendment; Section 8 Admin plan; certifications, etc.)
- Relocation
- Use of Federal Funds
- Fair Housing
- Close out of public housing (PIH 2016-23; HUD-5837)

## 2. Ownership & Control

### **How do you ensure you remain in control?**

- What does control mean for you?
- Ground Lease
- Participation in the ownership structure
- Contractual arrangements
- RAD statute ownership / control provisions
  - up front & at foreclosure
  - HUD-required provisions for organizational documents or ground lease.

### 3. Long-term affordability

#### How do we ensure the long-term affordability of the property?

- Need a covenant that runs with the land
- Use Agreement replaces DOT
- Use Agreement needs to be superior to other encumbrances & survive foreclosure
- Ground Lease gives PHA control over what happens when this project needs recapitalization

### 4. Contractual Obligations

#### Who reads all this??!

- Need good legal contract review
- Make sure you're not making conflicting promises
- Document agreements, get on the same page!
- What if things go sour?

## 5. Title

### **No one has looked at title for decades.**

- Need to make sure we are transferring and releasing DOT from correct parcel.
- Legal description may have changed (several times)
- Stale encumbrances can be hard to remove
- Seriously, this is going to take you longer than you anticipate.

## Key RAD Legal Documents

- **Master Development Agreement**
- **Organizational documents**
- **Ground Lease**
- **Use Agreement**
- **Subordination Agreements**
- **HAP contract**

## Documents: Master Development Agreement

### Set out the terms between PHA and Developer

- Document the business agreement
- Not a form document. Shape this for the particulars of your deal and your business relationship.

## Documents: Org Docs

### It's not all about % interest.

- Org Docs can allocate:
  - % interest
  - Cash flow
  - Consent rights
- HUD will review for HUD-required provisions (only)
- Yes, it's a form document but you can still shape this for the particulars of your transaction and your business relationship.

## Documents: Ground Lease

### Key tool to preserve the PHA's interests & long-term affordability

- Not a form. Shape this for the particulars of your transaction and your business relationship.
- HUD will review for HUD-required provisions (only)

## Documents: Use Agreement

### Replaces the DOT.

- Sets out basic affordability covenants.
- Runs with the land.
  - Superior to everything else.
  - Survives foreclosure
- Renews with the HAP Contract, survives termination of the HAP contract.

## Documents: HAP Contract

### **Show me the money. Key document.**

- 20-year term, w/ mandatory renewal.
- Want to collateralize to leverage private capital.
  - Lender provisions: Foreclosure would be default, need HUD consent for new owner. Use Agreement survives foreclosure, so project can't really work w/o the HAP subsidy. HUD allows Lender Temporary Custodian for limited time while parties find permanent replacement owner.
  - LIHTC provisions: parallel to lender provisions. LIHTC investor wants to be able to replace GP if things go awry.

## The Closing Process

- 1. Receive RAD Conversion Commitment (“RCC”)**
- 2. Talk with your HUD Closing Coordinator**
- 3. Talk with your project team**
- 4. Plan internal logistics**
- 5. Gather diligence required by HUD, lenders & investors**
- 6. Review documents**
- 7. Herd all the cats – sign-off, document execution & notarization, recording, much rejoicing.**



## Key Questions to ask during Closing

1. What are the closing requirements?
2. Who's responsible for what?
3. What are timing expectations?
4. Have we met administrative and logistical requirements?
5. Is relocation necessary?
6. Have tenant considerations been met?

## Rent Bundling (July 2018)

- RAD rent bundling has been a feature from the beginning
- New guidance expands to include non-RAD units:
  - Allows you to average rents among RAD and non-RAD PBV projects
  - Self-defined portfolio
  - Allows each building to underwrite on its own
  - Allows for phasing
- A simpler, more elegant, more stable way combining RAD & non-RAD PBVs and boost RAD rents

See [NP's Blog Post July 3, 2018 \(part 2\)](http://housingblog.nixonpeabody.com), <http://housingblog.nixonpeabody.com> and [PIH Notice 2018-11](#) (also Housing Notice 2018-05)

## Recent HUD Guidance on RAD & Section 18

- 75/25 split: If 75% of a project is going through RAD (and doing substantial rehab or new construction without using 9% LIHTCs), the remaining 25% can go through Section 18
- PHAs with  $\leq 50$  units, those units qualify for Section 18
- Scattered sites (non-contiguous buildings with  $\leq 4$  units) qualify for Section 18
- Projects where redevelopment out of public housing allows for greater efficiency & effectiveness (but watch out – only 25% of the units qualify for TPVs)

See [NP's blog post 6/12/18](http://housingblog.nixonpeabody.com), <http://housingblog.nixonpeabody.com> and [PIH 2018-04](#)

## 75% RAD-25% §18: What you need to know

- “Substantial Rehab:” Hard construction costs  $\geq 60\%$  of HUD’s “Hard Construction Costs”  
(see TDC / HCC chart or RAD Resource Desk tool)
- Section 18 processed at Financing Plan stage:
  - Normal FP submissions & approvals
  - §18 submissions: ID units, PHA Annual Plan, local government support letter, board resolution, resident consult
- RAD Relocation requirements govern

# QUESTIONS?

Call me, let's geek out on this stuff!



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