

January 21, 2022

Demetria McCain  
Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street, S.W.,  
Washington, DC 20410

RE: **The Fair Housing Implications of 8(bb) Transfers**

Dear Ms. McCain,

## **I. Introduction**

The undersigned civil rights and fair housing organizations write to follow up regarding our December 14, 2021 meeting with staff from HUD's Offices of Fair Housing and Equal Opportunity, General Counsel, and Multifamily Housing regarding civil rights issues in the 8(bb) transfer process for Section 8 Project-Based Rental Assistance contracts ("8(bb) transfers").<sup>1</sup> As you know, 8(bb) transfers permit owners of current Project-Based Rental Assistance contracts to apply to HUD to have those contracts moved to other properties. We thank you both for your willingness to meet regarding these critical issues and for the steps that HUD has already taken to advance fair housing during the Biden-Harris Administration under the leadership of Secretary Marcia Fudge, particularly its rulemaking efforts regarding the Fair Housing Act's discriminatory effects standard and the duty to affirmatively further fair housing.

We agree that 8(bb) provides an important vehicle to preserve federally assisted housing and promote opportunity in keeping with the duty to avoid reinforcing segregation and to further fair housing. We have concerns that the former goal may have higher priority, especially given the demand in the market for Project-Based Rental Assistance contracts, and that the second goal (and AFFH obligation) is being overlooked. This may impair subsidized families' ability to choose less segregated, lower poverty neighborhoods, which is often related to access to opportunity and quality of life. HUD and the owners who take part in these transactions should be obligated to consider the civil rights implications of their actions and take affirmative steps that protect impacted families and promote integration. This letter outlines key civil rights considerations and recommendations that should inform any new notice that HUD issues regarding 8(bb) transfers.

## **II. Problems with Notice H-2015-03**

### **a. Siting**

HUD Notice H-2015-03 makes explicit that the location of properties on the receiving end of 8(bb) transfers must comport with site and neighborhood standards.<sup>2</sup> Site and

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<sup>1</sup> Dep't of Hous. & Urban Dev., Transferring Budget Authority of a Project-Based Section 8 Housing Assistance Payments Contract under Section 8(bb)(1) of the United States Housing Act of 1937, H-2015-03, 2 (Apr. 3, 2015) (stating that the purpose of Section 8(bb) transfers is to preserve remaining Section 8 budget authority where the HAP "...contract is terminated or expires and is not renewed....")("Notice H-2015-03")

<sup>2</sup>*Id.* at 13-16; *see also* 24 C.F.R. § 983.57(d)-(e).

neighborhood standards are essential to HUD's own compliance with its statutory duty to affirmatively further fair housing.<sup>3</sup> Although this recognition on HUD's part is helpful, our experience, in practice, has been that enforcement of site and neighborhood standards is inconsistent and that approval of 8(bb) transfers to properties that would not satisfy an objective application of site and neighborhood standards is common. The primary driver of these lapses is an overly expansive interpretation of exceptions to generally applicable site and neighborhood standards in the case of "community revitalization" efforts.

For all transfers, including to already existing properties, HUD Notice H-2015-03 states in relevant part that "[t]he neighborhood must not be one that is seriously detrimental to family life or in which substandard dwellings or other undesirable conditions predominate, *unless there is actively in progress a concerted program to remedy the undesirable conditions.*"<sup>4</sup> For transfers to new construction properties, the notice provides more detail, stating that a receiving property may be located in an area in which the population is predominantly comprised of people of color only if:

*"The project is necessary to meet overriding housing needs that cannot be met in that housing market area. Application of the overriding housing needs criterion, for example, permits approval of sites that are an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood and of sites in a neighborhood experiencing significant private investment that is demonstrably changing the economic character of the area (a "revitalizing area"). An overriding housing need, however, may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise be feasibly met is that discrimination on the basis of race, color, creed, sex, or national origin renders sites outside areas of minority concentration unavailable, or if the use of this standard in recent years has had the effect of circumventing the obligation to provide housing choice."*<sup>5</sup>

Notwithstanding these provisions, HUD has approved 8(bb) transfers in highly segregated low-income communities of color with numerous adverse conditions despite a lack of significant private investment or concerted revitalization activity occurring in those neighborhoods. HUD typically only obtains a bare written justification concluding that revitalization is occurring in these neighborhoods, but therein lies the problem: local governments, in particular, frequently have place-based plans for the revitalization of disinvested communities that lack funding for implementation or that are too limited in scope to make an impact. At times, HUD appears to have relied upon designations – such as Promise Neighborhoods – that may not even ensure that an unimplemented revitalization plan is in place.

We recommend that HUD undertake two steps to ensure real compliance with site and neighborhood standards in the 8(bb) transfer context. First, the Office of Multifamily Housing should engage staff from HUD's Office of Fair Housing and Equal Opportunity (FHOO) in the 8(bb) transfer process at the earliest stage possible. By having staff with the expertise and explicit mission to assess compliance with site and neighborhood standards in the conversation early, HUD can avoid a dynamic where FHOO staff feel implicit institutional pressure to water

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<sup>3</sup> See *Shannon v. U.S. Dep't of Hous. & Urb. Dev.*, 436 F.2d 809, 821-822 (3d Cir. 1970) (listing factors that should guide HUD's siting determinations in order to ensure compliance with the duty to affirmatively further fair housing).

<sup>4</sup> Notice H-2015-03 at 13 (emphasis added).

<sup>5</sup> *Id.* at 15-16 (emphasis added).

down their site and neighborhoods standard review because HUD and external partners have already invested extensive resources in all of the other technical aspects of a proposed transfer. For example, project transfer applicants could preview the proposed transfer applicants to FHEO before the full 8(bb) transfer application is submitted.

Second, HUD should apply greater rigor in assessing whether revitalization is occurring. For the requirements that apply to all transfers, including ones not involving new construction, there must be “actively in progress a concerted program to remedy the undesirable conditions.” When evaluating whether this condition is met, HUD should ensure that all of the following are present: (1) a plan that addresses multiple facets of neighborhood opportunity beyond housing, (2) dedicated funding for the implementation of that plan, and (3) ongoing implementation of the plan.<sup>6</sup> For proposed transfers to new construction developments where a finding that “significant private investment that is demonstrably changing the economic character of the area” is occurring is required, HUD must look to the best available demographic data to evaluate whether, in fact, the economic character of an area is changing. In order to make this type of review meaningful, both FHEO staff and Office of Multifamily Housing staff would benefit from training on how to distinguish meaningful community revitalization and actually unfolding neighborhood change from mere words on a page.

### **III. Project-Based Contracts That Are Terminated – Iber Memo**

#### **a. Local Veto**

The negative civil rights and fair housing implications of local veto or local support requirements in the context of subsidized housing are well established. Predictably, predominantly white communities with a marked history of exclusion of people of color oppose – or withhold support from – proposed family-occupancy subsidized housing while racially and ethnically diverse municipalities are more likely to welcome the investment. Indeed, both HUD and the U.S. Department of the Treasury have opposed local veto or contribution requirements in the context of the Low-Income Housing Tax Credit (LIHTC) program. In 2017, HUD entered into a voluntary compliance agreement with the Maryland Department of Housing and Community Development, resolving allegations that a local contribution requirement – creating a local pocket veto, in practice – violated the Fair Housing Act due to its segregative effect.<sup>7</sup> In 2016, Treasury issued a revenue ruling stating that a state housing finance agency’s imposition of a local approval requirement was inconsistent with the policy of the Fair Housing Act, may have violated the Act’s nondiscrimination provisions, and was not required by the authorizing statute for the LIHTC program.<sup>8</sup> Yet, in a March 2018 memorandum, Robert Iber, then-Acting Deputy Assistant Secretary for Multifamily Housing Programs, wrote that HUD would not approve any 8(bb) transfer occurring as a result of a contract termination for which there was not a letter from a state or local governmental entity proposing the receiving site. This requirement is not required by any provision of the U.S. Housing Act and is patently inconsistent with both HUD’s duty to affirmatively further fair housing and with the positions described above that

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<sup>6</sup> See, e.g., PRRAC, *Assessment Criteria for Concerted Community Revitalization Plans: A Recommended Framework* (March 14, 2017), available at: [https://www.prrac.org/pdf/PRRAC\\_CCRP\\_recommendations\\_3\\_14\\_17.pdf](https://www.prrac.org/pdf/PRRAC_CCRP_recommendations_3_14_17.pdf)

<sup>7</sup> Voluntary Compliance Agreement and Conciliation Agreement between the U.S. Dep’t of Hous. & Urb. Dev., Baltimore Regional Housing Campaign & the State of Maryland, the Dep’t of Hous. & Community Dev. for the State of Maryland (Aug. 24, 2017), available at: <https://dhcd.maryland.gov/HousingDevelopment/Documents/rhf/DHCD-HUD-BRHCCconciliationAgreement.pdf>.

<sup>8</sup> Rev. Rul. 2016-29.

HUD and its sister agencies have previously staked out regarding the issue of local veto. HUD should promptly issue a memorandum rescinding those parts of the Iber memorandum that require state or local government approval of 8(bb) transfers. Doing so has the potential of opening a greater array of sites in higher opportunity areas for the development of badly needed, deeply affordable housing.

#### **IV. Limiting Changes in Unit Size and Type at Transfer**

In addition to concerns over where the transferred contracts are moved to, there are also concerns regarding the original size and type of the units under the contract, which are often altered as a part of the 8 (bb) transfer. These changes can greatly impact the available supply of Project-Based Section 8 housing for families with children (especially in areas of opportunity) and thus pose serious civil rights implications.

##### **A. The Size of the Units Transferring from Project(s) A to Project(s) B.**

HUD should more closely scrutinize the size of units transferring from Project(s) A to Project(s) B. Most critically, 8(bb) transfers, which so often occur due to the opt-out of a Project-Based Section 8 contract in a community of opportunity, should not have the effect of eliminating family sized units from communities of opportunity. Notice H-2015-03 has insufficient safeguards to ensure that family sized-units in Project A are not transferring to smaller size units, including one bedroom or studio units in Project B, thus reducing the supply of Project-Based Section 8 housing for families with children. HUD does require that owners ensure that no transfer involuntarily displaces residents, but that can be addressed by the resident receiving a voucher or remaining at Project A. Thus, these requirements do not go far enough to ensure that the unit sizes at Project B remain the same or similar.<sup>9</sup> Thus, the notice fails to preserve the supply of hard units of deeply affordable housing for larger households, including families with children.

Because opt-outs of Project-Based Section 8 contracts typically occur in gentrifying areas or communities of opportunity,<sup>10</sup> the absence of an obligation to have unit parity results in the loss of family sized units in communities of opportunity, with little prospect for the replacement of those family-sized units in the future.<sup>11</sup> The notice also foregoes the opportunity to force 8(bb) transfer applicants to actively find or propose to build the housing to meet the need. For example, we are aware of approved transfers where the owner of a suburban family development with one- and two-bedroom units in a community of opportunity was opting out of their HAP contract (“Project A”). HUD approved the 8(bb) transfer to a development in a rapidly changing area of the city (“Project B”). Project B only had one-bedroom units and housed seniors. Because this occurred at opt-out, the families at Project A received enhanced vouchers and elected to stay

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<sup>9</sup> Notice H-2015-03 at Section VIII(A)(2) and (3) requires HUD to ensure that Owner A has addressed any comments received from the tenants regarding the proposed transaction and that the proposal does not include any involuntary displacement of residents. Addressing tenant comments should be further explained to ensure that tenants have the right to move with the contract should they choose and, if they do, that an appropriately sized unit shall be made available for them.

<sup>10</sup> This is the result of the basic financial incentives facing owners whose decisions about renewal will often turn on whether HUD’s fair market rents are competitive with the private rental market.

<sup>11</sup> Anne Ray *et al.*, *Opting In, Opting Out: A Decade Later*, *Cityscape* 63, 79 (2018); <https://www.huduser.gov/portal/periodicals/cityscpe/vol20num1/ch3.pdf>.

rather than move with the transfer of the contract. As a result, there was no requirement that similar unit sizes be provided at Project B and now family sized units have been eliminated from a suburban community of opportunity without replacement. As the families using enhanced vouchers to remain at Project A gradually move away over time, those units will no longer be accessible to low-income households.

As HUD is updating Notice H-2015-03, HUD should ensure that there are guardrails in place to ensure the comparable unit analysis does not stop if tenants are not transferring to Project B. While the unit configurations do not always need to perfectly line up in order to further fair housing goals, HUD should disfavor transfers where family sized units are wholly eliminated. At a minimum, HUD should require that an effort be made to find available housing with units of an equivalent size and ensure that tenants who want to move into those units can move to a comparably sized unit. HUD should further signal that transfers that substantially change the configuration of units are disfavored, if there is an insufficient supply of Project-Based Section 8 family-sized units in areas of opportunity within the community.

#### B. The Type of the Units Transferring from Project(s) A to Project(s) B.

In addition to concerns about the loss of comparable unit sizes due to 8(bb) transfers, there are also concerns that HUD is permitting owners of Project(s)(B) to change the housing designation in the HAP contract of Project (A). There is nothing currently in the notice to prevent such a scenario. In fact, we are aware of situations where HUD approved the 8(bb) transfer from Project (A), which provided multi-family housing, to Project(s) B, that is or will be designated for seniors and/or persons with disabilities. There again, HUD is failing to consider the fair housing implications of these decisions that permanently remove site-based multi-family housing from the stock, and given the locational trend of opt-outs, in gentrifying areas or communities of opportunity. HUD's revised notice must limit the change in housing type, unless the receiving owner can demonstrate to the satisfaction of FHEO that there is a sufficient supply of multifamily affordable housing in areas of opportunity or that families are able to successfully use vouchers in areas of opportunity. HUD should also take account of the *Olmstead* mandate to provide truly integrated housing for persons with disabilities and how allowing multifamily contracts to be converted to housing designated for seniors and/or persons with disabilities is inconsistent with that obligation.

#### V. **HUD must Explicitly State that Eligible Families who Choose to Remain at the Property will Receive Enhanced Vouchers.**

Notice H-2015-03 does not explicitly state that eligible families who choose to remain will receive an enhanced voucher. The omission has created unnecessary confusion (including by HUD field offices) regarding the type of assistance families should receive following the transfer, creating additional hurdles for assisted families to assert their right to an enhanced voucher. There is no question, however, that enhanced vouchers must be required when an owner seeks to terminate or not renew the Project-Based Section 8 contract. Outside of those situations where the contract is terminated due to owner non-compliance, a 8(bb) transfer requires the owner of Property A and HUD to mutually terminate Property A's housing assistance payment (HAP) contract or allow the HAP contract to expire without renewal.<sup>12</sup> In those cases, HUD is statutorily required to issue enhanced vouchers to eligible families when a

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<sup>12</sup> Notice H-2015-03 at 2.

HAP contract terminates or expires as a part of the 8(bb) transfer process.<sup>13</sup> The planned update to Notice H-2015-03 should reflect this obligation.

The enhanced voucher program is intended to protect residents from displacement when the building's project-based rental subsidy ends.<sup>14</sup> A 2018 HUD report found that properties most at risk of owner opt-out are properties in communities with increasing rents and higher home values, as well as properties where the rent is below the surrounding fair market rent (FMR) and ownership is a for-profit.<sup>15</sup> In this way, enhanced vouchers are an important fair housing tool. Where the surrounding community has gentrified or cost of living has increased, the use of an enhanced voucher is typically the only way for families to continue to live in their community and have access to important life necessities (i.e., healthcare, childcare, services, etc.).

## **VI. HUD Must Require that the Families Who Leave the Property with Tenant Protection Vouchers are Offered High Quality Mobility Counseling.**

For families who either choose to leave the property with a tenant protection voucher or who must leave with a tenant protection voucher due to contract termination, HUD should make every effort to ensure that these families have the resources and support to remain in or potentially move to communities of opportunity. Without this support, families with tenant protection vouchers are highly likely to experience the same levels of discrimination and other barriers as other families with vouchers and be forced to rent in low-opportunity areas.<sup>16</sup> To that end, HUD should require (and issue standards to implement it properly implement), as a part of their relocation obligations, that the sending and/or receiving owners provide the resources necessary to offer these households high quality mobility counseling. The owners could contract with relocation counselors or local housing authorities (or nonprofits) who offer high quality mobility counseling who would then market this assistance to families receiving tenant protection vouchers as a result of the 8(bb) transfer, either from opt-out or contract termination.

## **VII. HUD Should Provide Data and Transparency Around Section 8(bb) Transfers**

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<sup>13</sup> 42 USC § 1437f(t)(2); Dep't of Hous. & Urban Dev., Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers) For Housing Conversion Actions – Policy and Processing Guidance PIH 2001-41 4 (Nov. 14, 2001) (“When an owner chooses to end participation in certain programs by either opting-out of or not renewing certain expiring Section 8 contracts, eligible low-income residents assisted under the expiring Section 8 project-based contract are eligible for enhanced voucher assistance.”); Letter from Benjamin T. Metcalf, Deputy Assistant Secretary for Multifamily Housing Programs, Dep't of Hous. & Urban Dev., to Multifamily Project Owners (Jun. 5, 2014).

<sup>14</sup> *Hayes v. Harvey*, 903 F. 3d 32, 44-45 (3rd Cir. 2018) (citing S. Rep. No. 106-161, at 162 (1999)); *Estevez v. Cosmopolitan Assocs. LLC*, 2005 WL 3164146, \*2, \*5 (E.D.N.Y. 2005) (citing H.R. Rep. No. 106-379, pt. 2, at 9 (1999)); Metcalf, *supra* note 2. An important difference between enhanced vouchers and Housing Choice Vouchers is the payment standard used for each program. Where a family chooses to remain at the property with their enhanced voucher, the family receives a higher payment standard “...that is equal to the [reasonable market] rent for the dwelling unit...” 42 USC § 1437f(t)(1)(B). Public housing authorities set payment standards for HCV programs at 90-110% of the (SA)FMR, which traditionally, for various reasons, has not kept pace with increasing housing costs.

<sup>15</sup> Ray, *supra* note 9.

<sup>16</sup> Martha Galvez, Urban Institute, *Neighborhood Mobility Programs as a Remedy to the Legacy of Racial and Economic Segregation*, <https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/neighborhood-mobility-programs-remedy-legacy-racial-and-economic-segregation> (last visited Jan. 10, 2022).

In order to effectively analyze the full extent of the fair housing issues raised by this letter and to effectively partner with HUD in addressing possible solutions, HUD should provide more data and transparency around the market of 8(bb) transfers. Otherwise, the priority will be on developers securing a transfer at whatever price, rather than the well-being of the impacted families and the opportunity to keep housing in areas of opportunity, or to move families to areas of opportunity.

To this end, HUD should be more transparent around approved and rejected 8(bb) transfers. HUD should provide a spreadsheet on its website listing all information on 8(bb) transfers, including any of the following information for each approved transfer:

1. Addresses of Project(s) A and Project(s) B;
2. Number and configuration of units at Project(s) A and Project(s) B;
3. Basis of the termination of the contract (i.e. opt-out, HUD initiated termination, voluntary termination);
4. Date of transfer approval;
5. Whether tenants relocated from Project(s) A to Project(s) B and whether vouchers were issued; and
6. Summary of FHEO Site and Neighborhoods Standards determination for Project B.

Additionally, in order to effectively partner with HUD to address possible solutions to the fair housing issues raised by this letter, we are requesting:

1. Copies of all requests for transfers of assistance, 2015 to the present;
2. Any HUD notices of non-approval of said transfers;
3. The PD&R Field Economist's memo and any associated FHEO reviews of all transfers;
4. All local government memos identifying prospective "Project B" recipients of transferred assistance, including the addresses for Project B locations;
5. Any third-party correspondence objecting to such proposed transfers and any response from owners of Project(s) A or B; and
6. Any contracts between owners of Project(s) A and Project(s) B or other documents indicating the amounts of money to be paid by owners of Project B in consideration for the transfer of assistance.

## **VII. Conclusion**

Thank you for the opportunity to discuss this important issue with you. HUD has the obligation to ensure that project-based Section 8 housing either remains in or moves to communities of opportunity and that the families who live in that housing are the beneficiaries of any transfers of assistance.

Sincerely,

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