

than the number of public housing units demolished. One of the following criteria must be satisfied:

(i) The number of public housing units being constructed is not more than 50 percent of the number of public housing units in the original development; or

(ii) In the case of replacing an occupied development, the number of public housing units being constructed is the number needed to house current residents who want to remain at the site, so long as the number of public housing units being constructed is significantly fewer than the number being demolished; or

(iii) The public housing units being constructed constitute no more than 25 units.

(6) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(7) The site shall be free from adverse environmental conditions, natural or manmade, such as: Toxic or contaminated soils and substances; mudslide or other unstable soil conditions; flooding; septic tank backups or other sewage hazards; harmful air pollution or excessive smoke or dust; excessive noise or vibrations from vehicular traffic; insect, rodent, or vermin infestation; or fire hazards. The neighborhood shall not be seriously detrimental to family life. It shall not be filled with substandard dwellings nor shall other undesirable elements predominate, unless there is a concerted program in progress to remedy the undesirable conditions.

(8) The site shall be accessible to social, recreational, educational, commercial, and health facilities; health services; and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing. The availability of public transportation must be considered.

(9) The site shall be accessible to a range of jobs for low-income workers and for other needs. The availability of public transportation must be considered, and travel time and cost via public transportation and private auto-

mobile must not be excessive. This requirement may be given less consideration for elderly housing.

(10) The project may not be built on a site that has occupants unless the relocation requirements at § 905.308(b)(9) of this part are met.

(11) The site shall not be in an area that HUD has identified as having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968, unless the development is covered by flood insurance required by the Flood Disaster Protection Act of 1973 and meets all applicable HUD standards and local requirements.

(e) *Relocation.* All acquisition or rehabilitation activities carried out with public housing funds must comply with the provisions of § 905.308(b)(9).

(f) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR Part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and the related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with 24 CFR 58.11 and may perform the environmental review itself under the provisions of 24 CFR Part 50. In those cases where HUD performs the environmental review under 24 CFR Part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

§ 905.604 Mixed-finance development.

(a) *General.* Mixed-finance development refers to the development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, where the public housing units are owned in whole or in part by an entity other than a PHA. If the public housing units being developed are 100 percent owned by the PHA, the project is not a mixed-finance project and will be not be subject to mixed-finance development requirements. However, all other development requirements of part 905 are applicable, and, if the project includes

both public housing funds and private funding for development, the project may be subject to other applicable program requirements; e.g., the Capital Fund Financing Program, Operating Fund Financing Program, Public Housing Mortgage Program, etc.

(1) *Ownership.* There are various potential scenarios for the ownership structure of a mixed-finance project, such as: public housing units may be owned entirely by a private entity; a PHA may co-own with a private entity; or a PHA affiliate or instrumentality may own or co-own the units.

(2) *Partnerships.* PHAs may choose to enter into a partnership or other contractual arrangement with a third party entity for the mixed-finance development and/or ownership of public housing units.

(3) *Funding.* Funding for mixed-finance developments may include one or a combination of funding sources, pursuant to § 905.600(d) of this part.

(4) *Modernization.* A mixed-finance project that involves modernization, rather than new construction, shall maintain the DOFA date that existed prior to modernization and shall be subject to the provisions of § 905.304(a)(2) of this part regarding the applicable period of obligation to operate the public housing units.

(b) *Definitions applicable to this subpart.* (1) *Mixed-finance.* The development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, using public housing, nonpublic housing, or a combination of public housing and nonpublic housing funds, where the public housing units are owned in whole or in part by an entity other than the PHA. A mixed-finance development may include 100 percent public housing (if there is an Owner Entity other than the PHA) or a mixture of public housing and nonpublic housing units.

(2) *Owner Entity.* As defined in § 905.108 of this part.

(3) *PHA instrumentality.* An instrumentality is an entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA, and through which PHA functions or policies are implemented, and which utilizes public

housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. An instrumentality assumes the role of the PHA, and is the PHA under the Public Housing Requirements, for purposes of implementing public housing development activities and programs, and must abide by the Public Housing Requirements. Instrumentalities must be authorized to act for and to assume such responsibilities. For purposes of development, ownership of public housing units by an instrumentality would be considered mixed-finance development.

(4) *PHA affiliate.* An affiliate is an entity, other than an instrumentality, formed by a PHA and in which a PHA has a financial or ownership interest or participates in its governance. The PHA has some measure of control over the assets, operations, or management of the affiliate, but such control does not rise to the level of control to qualify the entity as an instrumentality. For the purposes of development, ownership of public housing units by an affiliate would be considered mixed-finance development.

(5) *Public housing funds.* As defined in § 905.108 of this part.

(c) *Structure of projects.* Each mixed-finance project must be structured to:

(1) Ensure the continued operation of the public housing units in accordance with all Public Housing Requirements;

(2) Ensure that public housing funds committed to a mixed-finance project are used only to pay for costs associated with the public housing units, including such costs as demolition, site work, infrastructure, and common area improvements.

(3) To ensure that the amount of public housing funds committed to a project is proportionate to the number of public housing units contained in the project. To meet this “pro rata test,” the proportion of public housing funds compared to total project funds committed to a project must not exceed the proportion of public housing units compared to total number of units contained in the project. For example, if there are a total of 120 units in the project and 50 are public housing units, the public housing units are 42 percent of the total number of units in

the project. Therefore the amount of public housing funds committed to the project cannot exceed 42 percent of the total project budget, unless otherwise approved by the Secretary. However, if public housing funds are to be used to pay for more than the pro rata cost of common area improvements, HUD will evaluate the proposal to ensure that common area improvements will benefit the residents in the development in a mixed-income project; and

(4) Ensure that the project is within the Total Development Cost (TDC) and Housing Construction Cost (HCC) limits pursuant to §905.314(c) and (d) of this part.

(d) *Process.* Except as provided in this section, development of a mixed-finance project under this subpart is subject to the same requirements as development of public housing by a PHA entirely with public housing funds, as stated in §905.600 of this part. PHAs must submit an acquisition proposal under §905.608 and/or a development proposal under §905.606 or as otherwise specified by HUD.

(e) *Conflicts.* In the event of a conflict between the requirements for a mixed-finance project and other requirements of this subpart, the mixed-finance Public Housing Requirements shall apply, unless HUD determines otherwise.

(f) *HUD approval.* For purposes of this section only, any action or approval that is required by HUD pursuant to the requirements set forth in this section shall be construed to mean HUD Headquarters, unless the field office is authorized in writing by Headquarters to carry out a specific function in this section.

(g) *Comparability.* Public housing units built in a mixed-financed development must be comparable in size, location, external appearance, and distribution to nonpublic housing units within the development.

(h) *Mixed-finance procurement.* The requirements of 24 CFR Part 85 and 24 CFR 905.316 are applicable to this subpart with the following exceptions:

(1) PHAs may select a development partner using competitive proposals procedures for qualifications-based procurement, subject to negotiation of fair and reasonable compensation and com-

pliance with TDC and other applicable cost limitations;

(2) An Owner Entity (which, as a private entity, would normally not be subject to 24 CFR Part 85) shall be required to comply with 24 CFR Part 85 if HUD determines that the PHA or PHA instrumentality, or either of their members or employees, exercises significant decision making functions within the Owner Entity with respect to managing the development of the proposed units. HUD may, on a case-by-case basis, exempt such an Owner Entity from the need to comply with 24 CFR Part 85 if it determines that the Owner Entity has developed an acceptable alternative procurement plan.

(i) *Identity of interest.* If the Owner Entity or partner (or any other entity with an identity of interest with the Owner Entity or partner) of a mixed-finance project wants to serve as the general contractor for the mixed-finance project, it may award itself the construction contract only if:

(1) The identity of interest general contractor's bid is the lowest bid submitted in response to a request for bids; or

(2) The PHA submits a written justification to HUD that includes an independent third-party cost estimate that demonstrates that the identity of interest general contractor's costs are less than or equal to the independent third-party cost estimate; and

(3) HUD approves the identity of interest general contractor in conjunction with HUD's approval of the development proposal for the mixed-finance project.

(j) *Operating Subsidy-Only and Capital Fund-Only Assistance.* (1) *General.* This section refers to the mixed-finance development of public housing units that will be developed without public housing funds but will receive operating subsidy, or will be developed with public housing funds but will not receive operating subsidy.

(2) *Operating Subsidy-Only Development.* Operating Subsidy-Only Development refers to mixed-finance projects where public housing units are developed without the use of public housing funds, but for which HUD agrees to provide operating subsidies under Section 9(e) of the 1937 Act. These types of

project are subject to the following provisions:

(i) The newly developed public housing units will be included in the calculation of the Capital Fund formula in § 905.400 of this part.

(ii) An ACC Amendment will be executed to include the new public housing units. The term of the ACC Amendment will be determined based on the assistance as provided in § 905.304, unless reduced by the Secretary.

(iii) There shall be no disposition of the public housing units without the prior written approval of HUD, during, and for 10 years after the end of, the period in which the public housing units receive operating subsidy from the PHA, as required by 42 U.S.C. 1437g(3), as those requirements may be amended from time to time. However, if the PHA is no longer able to provide operating subsidies to the Owner Entity pursuant to Section 9(e) of the 1937 Act, the PHA may (on behalf of the Owner Entity) request that HUD terminate the Declaration of Trust or Declaration of Restrictive Covenants, as applicable. Termination under this section does not require disposition approval from HUD pursuant to Section 18 of the 1937 Act, 42 U.S.C. 1437p. However, the PHA must provide public housing residents with a decent, safe, sanitary, and affordable unit to which they can relocate, which may include a public housing unit in another development or a Housing Choice Voucher, and pay for the tenant's reasonable moving costs. The URA is not applicable in this situation.

(iv) Where the PHA elects in the future to use public housing funds for modernization of these units, the PHA must execute an ACC Amendment with a 20-year use restriction and record a Declaration of Trust or Declaration of Restrictive Covenants, in accordance with § 905.304. There may be no disposition of the public housing units without the prior written approval of HUD during the 20-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as those requirements may be amended from time to time.

(3) *Capital Fund-Only Development.* Capital Fund-Only projects refers to mixed-finance projects where a PHA and its partners may develop public housing units using public housing funds for development of new units, but for which HUD will not be providing operating subsidy under Section 9(e) of the Act, 42 U.S.C. 1437g(e). These types of projects are subject to the following provisions:

(i) The newly developed public housing units will not be included in the calculation of the Operating Fund formula.

(ii) The PHA must sign an ACC Amendment, with a 40-year use restriction, for development of new units and record a Declaration of Trust or Declaration of Restrictive Covenants in accordance with § 905.304 of this part, unless the time period is reduced by the Secretary.

(iii) There shall be no disposition of the public housing units, without the prior written approval of HUD, during a 40-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as required by section 9(d)(3) of the 1937 Act, 42 U.S.C. 1437g(d)(3), as those requirements may be amended from time to time.

(4) *Procedures.* PHAs must follow the development approval process identified in § 905.600.

(k) *Mixed-finance operations: Deviation from HUD requirements pursuant to section 35(h) of the 1937 Act, 42 U.S.C. 1437z-7(h).* (1) *Deviation.* If a PHA enters into a contract with an entity that owns or operates a mixed-finance project, and the terms of the contract obligate the entity to operate and maintain a specified number of units in the project as public housing units, the contract may include terms that allow the Owner Entity to deviate from otherwise applicable Public Housing Requirements regarding rents, income eligibility, and other areas of public housing management with respect to all or a portion of the public housing units, subject to the following conditions:

(i) There are a significant number of units in the mixed-finance project that are not public housing units;

(ii) There is a reduction in appropriations under Section 9(e) of the 1937 Act (see 42 U.S.C. 1437g(e)) or a change in applicable law that results in the PHA being unable to fulfill its contractual obligation to the Owner Entity with respect to the public housing units;

(iii) Prior to implementation of the contractual terms related to deviation from the Public Housing Requirements, HUD approves an Alternative Management Plan for the mixed-finance project; and

(iv) The deviation shall be to the extent necessary to preserve the viability of those units while maintaining the low-income character of the units to the maximum extent practicable.

(2) *Preparation of an Alternative Management Plan.* Should the PHA and the Owner Entity determine a need to deviate from the Public Housing Requirements, the PHA, on behalf of the Owner Entity, must submit an Alternative Management Plan to HUD for review and approval prior to implementation of any changes. The Plan must include the following:

(i) A statement describing the Owner Entity's reasons for deviating from the Public Housing Requirements;

(ii) An explanation of the Owner Entity's proposed remedies, including, but not limited to:

(A) How the Owner Entity will select the residents (including the number and income levels of the families proposed to be admitted to the public housing units) and units to be affected by the proposed change;

(B) The Owner Entity's timetable for implementing the Alternative Management Plan;

(C) The impact on existing residents. Note that for any resident who is unable to remain in the unit as a result of implementation of the Alternative Management Plan, the resident must be relocated to a public housing unit or given a Housing Choice Voucher by the PHA or by another entity as provided for in the contractual agreement between the PHA and the Owner Entity;

(iii) An amendment to the existing contractual agreement between the PHA and the Owner Entity that includes provisions which ensure that:

(A) An update on the Alternative Management Plan is submitted annu-

ally to HUD to ensure that implementation of the provisions of the Alternative Management Plan continue to be appropriate;

(B) The Owner Entity complies with the requirements of this subpart in its management and operation of the public housing units in accordance with the Alternative Management Plan;

(C) The Owner Entity provides the PHA any income that is generated by the public housing units in excess of the Owner Entity's expenses on behalf of those units, as a result of implementation of provisions in the Alternative Management Plan;

(D) The Owner Entity reinstates all Public Housing Requirements (including rent and income eligibility requirements) with respect to the original number of public housing units and number of bedrooms in the mixed-finance development, following the PHA's reinstatement of operating subsidies at the level originally agreed to in its contract with the Owner Entity; and

(iv) Additional evidence. The PHA must provide documentation that:

(A) The Owner Entity has provided copies of the Alternative Management Plan to residents of the project and provided the opportunity for review and comment prior to submission to HUD. The Owner Entity must have provided written notice to each of the public housing residents in the mixed-finance development of its intention to implement the Alternative Management Plan. Such notice must comply with all relevant federal, state, and local substantive and procedural requirements and, at a minimum, provide public housing residents 90 days advance notice of any proposal to increase rents or to relocate public housing residents to alternative housing;

(B) The revenues being generated by the public housing units (in combination with the reduced allocation of Operating Subsidy resulting primarily from a reduction in appropriations or changes in applicable law such that the PHA is unable to comply with its contractual obligations to the Owner Entity) are inadequate to cover the reasonable and necessary operating expenses of the public housing units. Documentation should include a financial

statement showing actual operating expenses and revenues over the past 5 years and the projected expenses and revenues over the next 10 years;

(C) A demonstration that the PHA cannot meet its contractual obligation, and;

(D) The Owner Entity has attempted to offset with regard to the project, the impact of reduced operating subsidies or changes in applicable law by all available means; including the use of other public and private development resources, the use of cash flow from any nonpublic housing units, and funds from other operating deficient reserves.

(3) *HUD review.* HUD will review the Alternative Management Plan to ensure that the plan meets the requirements of this subpart and that any proposed deviation from the Public Housing Requirements will be implemented only to the extent necessary to preserve the viability of the public housing units. Upon completion of HUD's review, HUD will either approve or disapprove the Alternative Management Plan. Reasons for HUD disapproval may include, but are not limited to, the following:

(i) The justification for deviation from the Public Housing Requirements does not qualify in accordance with section 35(h) of the Act (42 U.S.C. 1437z-7(h)).

(ii) The proposed deviation(s) from the Public Housing Requirements are not limited to preserving the viability of the public housing units.

(iii) The information that HUD requires to be included in the Alternative Management Plan has not been included, is not accurate, or does not support the need for deviation from the Public Housing Requirements.

(iv) HUD has evidence that the proposed Alternative Management Plan is not in compliance with other federal requirements, including civil rights laws.

(4) *HUD reevaluation and reapproval.* The PHA, on behalf of the Owner Entity, must provide to HUD, for HUD approval, an annual update on the implementation of the Alternative Management Plan. The update must provide the status of the project and whether the circumstances originally triggering

the need for the conditions contained in the Alternative Management Plan remain valid and appropriate. Any proposed changes in the Alternative Management Plan should also be identified. Once the annual update of the Alternative Management Plan is properly submitted, the existing Alternative Management Plan shall remain in effect until such time as HUD takes additional action to approve or disapprove the annual update.

§ 905.606 Development proposal.

(a) *Development proposal.* Prior to developing public housing, either through new construction or through acquisition, with or without rehabilitation, a PHA must submit a development proposal to HUD in the form prescribed by HUD, which will allow HUD to assess the viability and financial feasibility of the proposed development. A development proposal must be submitted for all types of public housing development, including mixed-finance. Failure to submit and obtain HUD approval of a development proposal may result in the public housing funds used in conjunction with the project being deemed ineligible expenses. In determining the amount of information to be submitted by the PHA, HUD shall consider whether the documentation is required for HUD to carry out mandatory statutory, regulatory, or Executive order reviews; the quality of the PHA's past performance in implementing development projects under this subpart; the PHA's demonstrated administrative capability; and other program requirements. The development proposal shall include some or all of the following documentation, as deemed necessary by HUD.

(1) *Project description.* A description of the proposed project, including:

(i) Proposed development method (e.g., mixed-finance, new construction, acquisition with or without rehabilitation, turnkey, etc.), including the extent to which the PHA will use force account labor and use procured contractors. For new construction projects, the PHA must meet the program requirements contained in § 905.602. For projects involving acquisition of existing properties less than 2