

Memorandum

TO: DC Housing Preservation Strike Force

FROM: Chris Hornig

DATE: November 18, 2015

SUBJECT: Preserving Subsidy Contracts (If Not Buildings) Using Section 8(bb) & DOPA

When owners of Section 8-assisted properties exit the program, absent any more affirmative preservation efforts, the project-based rental assistance (“**PBRA**”) is converted to tenant-based assistance administered by the local housing authority. This protects existing tenants and increases the overall supply Section 8 vouchers in the region – both important – but does nothing to preserve the long-run availability of specific buildings to low-income tenants and does not provide an underwritable revenue stream for project financing.

A tool for preserving the PBRA contract itself, while simultaneously furthering fair housing goals and deconcentrating poverty by moving project-based assistance to one or more new housing resources, is Section 8(bb) of the U.S. Housing Act of 1937, as amended (“**8(bb)**”). The common function of 8(bb) is to permit HUD to move a Section 8 contract from an inappropriate location (building destroyed by casualty, irreparable physical obsolescence, deterioration of neighborhood, etc.) to one or more new locations more suitable to low-income occupancy. Because the occasion of moving the subsidy also permits issuing a new contract with a financeable term (instead of the one-year renewals that current owners generally receive), 8(bb) is an important new tool in the arsenal of affordable housing providers. In a typical example, a preservation-minded provider might purchase an existing assisted property of 200 assisted units and, in a phased redevelopment program, move its PBRA to four redevelopment phases (off-site first, then on the progressively cleared site). Each redevelopment phase might have 100 units, with 50 PBRA assisted units (deep-subsidy) and 50 unassisted LIHTC or market units. To the extent that temporary offsite relocation of tenants was required, the owner could use “pass-through leases” partially funded with the Section 8 rental assistance to reduce or eliminate that cost. The “receiving” property or properties can be existing properties, with or without existing HUD assistance, or new construction (although the 8(bb) transfer cannot be finalized until construction is complete)

Significantly, residents are not required to follow subsidy to a new location if they do not wish to. Under 8(bb), such residents would be entitled to Tenant Protection Vouchers, resulting conceivably in a net increase of assistance from HUD to the jurisdiction.

While HUD is taking steps to streamline the 8(bb) program, it involves an extensive application and review process. HUD must determine various things, including (i) that the receiving property meets site-and-neighborhood standards including, notably, those relating to areas of minority or poverty concentration; (ii) residents will be relocated in accordance with all applicable standards including the URA; and (iii) there has been full tenant consultation. HUD has been embracing the revitalization potential of 8(bb) and making efforts to streamline the process, but it remains daunting, and certainly not one that an owner wishing to exit the Section 8 program would willingly participate in.

The Strike Force should give thought to ways in which existing owners can be incentivized to utilize the 8(bb) program or, in the alternative, cooperate in its use. Examples might be:

- **Existing owner willing to remain in the program, but intent on demolishing and rebuilding a project (presumably at greater density):** The District could provide encouragement, technical assistance and/or funding so that the existing owner could temporarily relocate residents offsite with “pass-through leases”, demolish and rebuild, and then use 8(bb) to place a new fifteen-year PBRA contract on the redeveloped units, or a portion of them. If the owner was unwilling to bring back the full number of previously-assisted units, the District could assist in identifying another developer willing to accept the remainder, in a scenario similar to the next one described.
- **Existing owner willing to remain in the program, but not at the currently-assisted site:** With District encouragement and/or technical assistance, using 8(bb) the existing owner could move subsidy to other unsubsidized units in the owner’s portfolio or to a new development undertaken by the owner
- **Existing owner unwilling to remain in program (whether retaining or demolishing the existing building):** The District could assist in identifying other developers willing to accept all or a portion of the PBRA contract and those of the current residents who wished to move to that developer’s project. Then, the District could facilitate the preparation of an 8(bb) application to HUD so that the contract could be moved, in whole or in several parts.

Challenges

The primary obstacle to the use of 8(bb) to preserve a PBRA contract where the existing owner does not wish to remain in the program is the time and complexity of the process. Presuming that the exiting owner has an extensive renovation or demolition/reconstruction program, he/she will be focused on controlling timeline and externalities, and with proceeding swiftly when market conditions are favorable. That kind of predictability and control, unfortunately, is difficult in a HUD environment. What could the District do to assist and incentivize that developer to cooperate in an 8(bb) process?



- Clearly, the first imperative would be for the District to establish a dialogue with the exiting owner early in the process, when the delay and uncertainty could be integrated into the exiting owner’s own redevelopment plans.
- The District could assist in locating recipient developers. While this contribution might be purely one of making introductions, the District could also consider ways to integrate the re-distribution of the 8(bb) units into its comprehensive NOFA process. For instance, the exiting owner might assign to DHCD the ability to select 8(bb) recipients, so that DHCD could award that assistance together with LIHTC, Trust Funds, etc. However, waiting for a NOFA process to select a Section 8 contract recipient might add far more time to the process than the exiting owner would accept. And since any 8(bb) transfer is subject to HUD approval, uncertainty and delay are introduced.
- The District might need to incentivize exiting owners to participate through financial assistance, density bonuses, and other types of cooperation extended or withheld.
- The District could provide technical assistance, presumably by referring or engaging expert consultants.

8(bb) and DOPA

There is a compelling rationale for utilizing the District Opportunity to Purchase Act (*DOPA*) in combination with an 8(bb) execution. The buildings that currently have PBRA contracts are likely to be high on any list of suitable properties for DOPA – they typically have more than 100 units and tend to house vulnerable, very-low income families. It is the loss of such buildings that is at the heart of the Mayor’s request for a revitalized preservation policy in the District. Yet DOPA by itself may be an imperfect or unavailable solution. If the building is underutilizing a high-value site, the cost to the District may far exceed the housing value of the building. Alternatively, the existing building may offer less than an ideal housing situation for lower-income families, whether due to location, building configuration, obsolescence, or other cause.

DOPA and 8(bb) may work together well in such situations. Instead of trying to incentivize an impatient or uncooperative owner, the District could utilize DOPA to purchase a building and operate it through DCHA or a private “receiver” while navigating the 8(bb) process. Once HUD approval was obtained, the building and contract could be transferred to a successor owner, or the PBRA contract could be transferred in whole or part to new sites so that the old building could be demolished and the site repurposed.

Significantly, this would allow the District to pay a market price for a property even if the “affordable housing value” of the site did not justify it. After “harvesting” the PBRA contract, the District could resell the property for approximately its original purchase price. Put otherwise, the District could value an expiring-use property as “site plus PBRA” while paying only for the site.

Alternatively, an unsubsidized DOPA property might be a suitable 8(bb) recipient from a different expiring-use property (whether or not the second property was purchased under DOPA), as part of a redevelopment plan.



Retroactivity

While 8(bb) is generally understood to apply to properties with still-active PBRA contracts, statutorily it remains available even after an owner has terminated a contract, so long as funding remains in the account. We understand that HUD agrees that in principle, after an owner opts-out and terminates its contract, HUD could use 8(bb) to award the remaining dollars in the account to a new owner, and then offer a 15-year renewal contract. However, HUD OGC has advised that HUD could only award the funds through a competitive NOFA, and HUD for whatever reason has been unwilling to initiate such a process.

If there have been contracts terminated in the District in the past year, there might be potential in the District's approaching HUD and proposing assignment of the remaining contract to the District on a placeholder basis while the District could use a competitive process to select a transferee.

Conclusion

The District should make a concerted effort to ensure that every unit of PBRA assistance in the District is preserved, whether or not the currently-assisted housing is.

