



June 17, 2019

Public Finance and Regulatory Analysis Division
Office of Policy Development and Research
US Department of Housing and Urban Development
451 7th St SW, Room 8216
Washington, DC 20410-0500

Re: Review of HUD Policy in Opportunity Zones
FR-6155-N-01

To Whom It May Concern:

Thank you for the opportunity to provide comments, consistent with Executive Order 13853 regarding potential actions by the US Department of Housing and Urban Development (“HUD”) to encourage beneficial investment in economically distressed communities, including qualified Opportunity Zones. We applaud HUD for seeking input and recommendations from the public and for the actions HUD has taken so far, including those announced in Notice H 2019-07, Incentives for FHA Mortgage Insurance for Properties Located in Opportunity Zones (“Notice H 2019-07”) and proposed regulatory changes to the HOME and CDBG programs.

We submit these comments on behalf of the members of the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) who represent the \$1.3 trillion apartment industry and its nearly 39 million residents. For more than 20 years, NMHC and NAA have partnered to provide a single voice for America’s apartment industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of the apartment industry’s largest and most prominent firms. As a federation of 160 state and local affiliates, NAA encompasses over 75,000 members representing 9.25 million rental housing units globally.

Our recommendations are organized in three general topic areas: (1) encouraging and facilitating the use of FHA-insured Multifamily financing in Opportunity Zones, (2) reducing regulatory burden in Opportunity Zones and (3) incentivizing investment in Opportunity Zones through other HUD programs. We note that the impetus for creating Opportunity Zones through the 2017 Tax Cuts and Jobs Act was to spur economic development and job creation by encouraging private sector investment in economically distressed and low-income communities. To this end, we encourage HUD to continue to incentivize economic investment in Opportunity Zones without limiting those incentives to transactions with Qualified Opportunity Fund investment. If HUD can leverage a census tract’s designation as an Opportunity Zone to incentivize further investment in these areas beyond Qualified Opportunity Funds, it will broaden the effects and success of the Opportunity Zones initiative.

1. **Encourage and Facilitate the Use of FHA-Insured Multifamily Financing in Opportunity Zones**

We support the incentives set forth in Notice H 2019-07, namely designating specialized senior underwriters to process FHA-insured transactions located in Opportunity Zones with investment by a Qualified Opportunity Fund, and decreasing application fees for FHA-insured transactions in Opportunity Zones, and we urge HUD to move further in these directions. We offer the following suggestions:

a. Opportunity Zones Pilot. As you know, Qualified Opportunity Funds must make investments by the end of 2019 in order to achieve the maximum benefit of the potential capital gains deferral and step-up to basis offered in qualified Opportunity Zones. FHA-insured multifamily mortgage loans are excellent loan products whose favorable terms can be used effectively in Opportunity Zones. However, the long processing times for FHA-insured loans make potential developers and investors hesitant to use FHA-insured mortgage loans when they face closing and development deadlines. If HUD could ensure that FHA-insured loans would be processed and, if compliant with FHA requirements, closed within a fixed period of time, it would greatly facilitate investment in Opportunity Zones.

We suggest that HUD create an Opportunity Zones Pilot program, modeled after the LIHTC pilot, for all FHA-insured multifamily transactions in Opportunity Zones. Although modeled after the LIHTC pilot, the Opportunity Zones Pilot should focus on FHA-insured transactions in Opportunity Zones regardless of whether they include LIHTC investment or not. FHA could set Opportunity Zone Pilot processing time targets similar to those of the LIHTC pilot, including 30 days for simple expedited transactions and 60 days for standard transactions. The key would be, similar to what is done to manage the year-end closing schedule for the RAD transactions, that HUD commit to issuing a Firm Commitment (or indicating that the project is not approvable under FHA guidelines) and closing by set dates if complete applications are received by established deadlines. For example, HUD could commit to issuing a Firm Commitment (or indicating that the project is not approvable under FHA guidelines) by November 29, 2019 and a closing for all approved transactions by December 31, 2019, for all projects that submit complete Firm Applications by October 1, 2019. In addition, HUD should ensure that adequate Multifamily and Office of General Counsel (OGC) staff will be available to close Opportunity Zone transactions in December. This certainty of execution would be a huge incentive. While we believe this Opportunity Zones Pilot should apply to all transactions in Opportunity Zones in order to maximize its benefit, significant benefit may also be achieved by limiting the pilot to transactions that involve investment from a Qualified Opportunity Fund.

b. Minimize Regulatory Burdens. Along with decreasing processing time, reducing the regulatory burden on FHA-insured transactions would do much to facilitate investment in Opportunity Zones. By recognizing that economically distressed areas have extra difficulties in achieving investment and development, HUD should make FHA-insured transactions as easy to achieve as possible.

- For 223(f) transactions, per unit construction cost limits should be set as high as permitted by statute. We note the key role higher cost limits play in the success of the 223(f) LIHTC pilot. Opportunity Zones should be designated as “special limit areas,” “high cost areas,” or otherwise permitted to utilize the highest percent multiplier allowable by statute.
- Allow the highest loan to value ratios permitted by statute for all FHA-insured transactions.
- HUD should work with the Department of Labor (“DOL”) to modify the implantation of Davis Bacon wage requirements so as to reduce the regulatory burdens and eliminate the disincentives such burdens provide, as described in further detail below.
- Stipulate that Qualified Opportunity Fund investors will be treated as passive investors and thus treated as Non-Controlling Participants who do not need to submit Form 2530 or undergo Previous Participation Review. Further stipulate that underwriting requirements for passive investors will be limited to credit availability and will not include so-called character review or other reviews that are unnecessary for participants who are not in controlling roles.
- Recognize that building code or local violations may be present prior to redevelopment and allow such violations to be addressed during rehabilitation rather than as a prerequisite to closing.

c. Encourage the use of equity brokers. Especially for economically distressed areas, such as Opportunity Zones, intermediaries are often necessary to connect potential investors with those in need of investment. This is especially true for FHA-insured transactions. Private equity, such as Opportunity Zone investment, is not common in FHA transactions; intermediaries may be necessary in order to connect investors with projects. The most likely intermediaries to be effective would be existing FHA loan product brokers and their affiliates who are already familiar with FHA regulatory requirements. However, because loan brokers are typically paid from the lender’s fees, the MAP guide considers brokers as having an identity of interest with the lender. This interpretation prohibits brokers from playing similar roles in facilitating equity investments in transactions. If brokers have an identity of interest with lenders, they cannot play a role in the organizational structure of a borrower because this would be an impermissible identity of interest. In private equity models, fund managers play the intermediary role, connecting investors with transactions and administering the equity funds. Typical private equity structures require fund managers to be a member of the fund. However, if that fund manager is affiliated with the loan broker, then HUD’s determination that loan brokers have an identity of interest with lenders would prohibit this structure. Because both FHA-insured transactions and Opportunity Zone investment are specialized, HUD should eliminate any possible barriers to combining the two, including allowing affiliates of FHA-insured loan brokers to serve as fund managers to facilitate equity investment in FHA-insured transactions.

2. Reduce the Regulatory Burden in Opportunity Zones

NMHC and NAA applaud HUD for its recent efforts to reduce regulatory burdens and encourage HUD to do more in this respect. As with our suggestions above with respect to FHA-insured

transactions, reduction of regulatory burdens more broadly can incentivize and facilitate investment in Opportunity Zones. We offer the following suggestions:

a. NEPA/ Environmental Review. Environmental review is often a time-consuming endeavor that can create delays and add costs to transactions. For transactions requiring environmental review under Part 50, a significant cause of confusion and delay can often be determining the Responsible Entity and pursuing that agency's specific process to complete such environmental review. This is a common issue in RAD PBV transactions, among others. For transactions located in Opportunity Zones, HUD should exercise its prerogative under 24 CFR 58.11 to conduct the review. In addition, whatever HUD can do to standardize and streamline this review would be beneficial. We suggest using the streamlined environmental review established for small PHAs in RAD transactions as a model.

b. Davis Bacon. The revisions set forth in Notice H-2018-11, no longer requiring application of Davis Bacon wages to the RAD Second Component for PBRA conversions, implement appropriate boundaries on the application of Davis Bacon wages in a manner consistent with the intent of the statute. More can be done to ensure that Davis Bacon requirements are implemented in a manner to stimulate job growth and encourage rather than hinder investment. As chair of the White House Opportunity and Revitalization Council established by Executive Order 13853, HUD can clarify the Administration's position on aspects of Davis Bacon that have recently been causing confusion and unnecessary costs and delays to development.

- First, HUD and DOL could articulate a joint policy statement to clarify that a single wage rate can be used for residential projects where incidental construction costs, such as road construction, total less than 20 percent of total project costs. This would return to a long-established practice completely in-line with the letter and spirit of the statute. Recent split-wage decisions have caused an extreme hardship and unnecessary delays on projects and have resulted in less development and investment. Especially in economically distressed areas, this confusion and unnecessary regulatory burden can stifle investment and growth.
- Existing DOL procedures allow for updates to Davis-Bacon wage decisions at any time prior to the closing of a transaction. These last minute changes cause disruptions, drive up costs and unnecessarily require repetition of previously completed processes. HUD and DOL should clarify procedural policies and allow transactions to rely on applicable wage rates as of the date the firm commitment application is submitted to HUD for FHA-financing or the equivalent application for financing is submitted for other federal programs. Because construction costs are the largest costs in a transaction, it is vital that transactions be able to rely on the wage rates they are structuring their deal around, rather than scramble to adjust to last-minute changes.
- HUD and DOL can create small-area prevailing wage rates, akin to HUD's small area FMRs. The Davis Bacon Act requires contractors and subcontractors pay their laborers no less than the locally prevailing wages and fringe benefits for

corresponding work on similar projects in the area. In economically distressed areas, the current DOL rates do not represent local prevailing wages. A shortage of investment creates a shortage of work which reduces the number of local contracting firms. The actual “prevailing” wage in the Opportunity Zone area is lower than surrounding areas, but higher DOL reflected wages would drive up the costs of development. The cost of pulling contractors from economically more vibrant areas where projects are more plentiful is also higher. Recognizing the true prevailing wage in the economically distressed census tracts designated as Opportunity Zones can help to correct this imbalance.

- Alternatively, HUD can review the source data from the DOL and waive the applicability of Davis Bacon wages if the DOL does not have sufficient voluntary data from local contractors in the local Opportunity Zones area to meet its statutory obligation.

c. Site and Neighborhood Standards. Fair housing standards typically prohibit new construction in areas of minority concentration unless the area is experiencing significant private investment and is considered a revitalizing area. Designation of an area as an Opportunity Zone should qualify the area as being part of a state and local plan to spur private investment and revitalize the area. Therefore, all Opportunity Zones should qualify as revitalizing areas for purposes of the area of minority concentration analysis when such analysis is required pursuant to site and neighborhood standards. Rather than requiring review by the Office of Fair Housing and Equal Opportunity or others, projects should be deemed to meet site and neighborhood standards if they are located in Opportunity Zones.

3. Using Other HUD Programs and Tools to Incentivize Investment in Opportunity Zones

HUD has many programs and tools focused on community and economic development which can be effectively focused to promote investment in Opportunity Zones. We encourage HUD to look at all its programs and tools to find additional flexibilities and ways to incentivize investment in economically distressed areas. We offer the following suggestions:

a. Competitive Funding. HUD could further emphasize their desire to drive investment in Opportunity Zones by enhancing the scoring of an application for any of the programs for which they issue a Notice of Funding Availability (“NOFA”). In several of the NOFAs that have been issued thus far in 2019 (Main Street, Choice Neighborhood Planning Grant, Indian Housing Block Grant, etc.) HUD has provided an additional two points for applications for projects/activities in an OZ. The Department could go further and add more points. In addition, not every program for which HUD has issued a NOFA has any scoring priority for projects in an OZ; for instance, the Section 202 Supportive Housing for the Elderly Program did not include such a scoring preference.

b. Block Grants. The two biggest sources of HUD funding that goes to communities are the HOME and CDBG programs. While HUD does not dictate how participating jurisdictions (“PJs” for HOME) or entitlement communities (“ECs” for CDBG) utilize the funds

provided under these programs they do provide broad parameters, and in some cases guidance on the use of funds. For instance, in the HOME program HUD dictates that PJ's reserve at least 15 percent of their allocations to fund housing to be owned, developed, or sponsored by experienced, community-driven nonprofit groups designated as Community Housing Development Organizations (CHDOs). In CDBG HUD could make clear that investment in eligible projects in OZ's meet the articulated national objectives. They could go further in the CDBG Program – the existing Colonias Set-Aside requires the border states of Arizona, California, New Mexico and Texas to set aside a percentage of their annual State CDBG allocations for use in the Colonia to help meet the needs of the Colonias residents in relationship to the need for potable water, adequate sewer systems, or decent, safe and sanitary housing. HUD could do a set-aside for CDBG projects in Opportunity Zones. More broadly, HUD could require states and localities administering these programs to state how they will address identified needs in Opportunity Zones in their Consolidated Planning process.

c. DDAs. LIHTCs are one of the top drivers of development in revitalizing areas such as Opportunity Zones. The LIHTC statute (“Section 42,” or 26 USC 42) recognizes that some areas, where high construction, land and utility costs relative to area median gross income, are difficult to develop, identifying those areas as “difficult development areas” (“DDAs”). DDAs receive a basis boost, making them able to leverage additional LIHTC investment. Pursuant to Section 42, HUD determines which areas are considered DDAs (26 USC 42(d)(5)(B)(i)). By definition, Opportunity Zones are areas where development costs are high relative to the area's median income, therefore, HUD should designate all Opportunity Zones as DDAs.

d. Project-based Vouchers. HUD could do a Request for Proposals (“RFP”) for Project-based vouchers (“PBVs”) for new projects to be built in Opportunity Zones. There is precedent for HUD running this type of RFP. HUD held three competitions, in 2010, 2014, and 2015 to competitively award a total of over 2,600 project-based HUD-Veterans Affairs Supportive Housing vouchers. Section 8 administering agencies would work with sponsors of new housing developments located in Opportunity Zones to put together an application for this dedicated pot of PBVs. Any PBVs awarded through this process should not count against the agency's program cap, nor should they be subject to the typical project cap on project-basing.

e. PBRA opt-outs. Every year, as the Project-Based Rental Assistance (“PBRA”) portfolio, originally funded in the 1970s, ages, some owners of PBRA-assisted properties opt-out of renewing their HAP contracts. HUD has not been allocated new budget authority to issue new PBRA contracts, but Section 8bb of the U.S. Housing Act of 1937 (“Section 8bb”) requires HUD to preserve and transfer the budget authority of PBRA-assistance of projects that are opting out of renewing their HAP contracts or that would otherwise be lost. HUD has broad discretion to implement this statutory mandate however it deems most appropriate. Section 8bb reads:

“If an assistance contract under this section ... is terminated or is not renewed, or if the contract expires, the Secretary shall, in order to provide continued assistance to eligible families ... transfer any budget authority remaining in the contract to another contract. The transfer shall be under such terms as the Secretary may prescribe.”

PBRA assistance can be a powerful driver of economic development. Long before LIHTCs, the rental income guaranteed by PBRA HAP contracts allowed projects to underwrite debt and leverage that subsidy into development. Part of the reason that development is difficult in economically distressed areas is that the residents of those areas cannot afford to pay enough rent to produce sufficient income to service the debt necessary to fund the construction of the apartment complex. PBRA solves this problem. Currently, developers who could utilize PBRA budget authority must follow the process set forth in Notice H 2015-03 (the “2015 8bb Notice”). This process is administratively difficult and requires significant participation from the current project owner, who is trying to opt-out of further participation with HUD. Furthermore, there is no way to connect developers who could utilize PBRA budget authority with owners who are opting out of PBRA contracts. The 2015 8bb Notice is administrative guidance. There is nothing in statute or regulation that would prohibit HUD from changing these requirements or establishing a different process where appropriate. The mandate of Executive Order 13853 warrants establishing a new process for transferring PBRA assistance pursuant to Section 8bb.

HUD should pool all expiring budget authority and publish the amount of budget authority it has available. Project owners should be able to request a portion of this pooled budget authority and be placed on a ranked waitlist, according to preference priorities established by HUD, as was done with the application categories in the RAD program. HUD could announce set dates at which it would offer set amounts of available budget authority according to the waitlist. Applicants would then have some time, such as until the end of the next calendar year, to provide the necessary documentation to HUD and close on their transactions. Preference could be given to projects located in Opportunity Zones in the same state as contracts that are terminated or are not being renewed; provide a certain amount of private investment to leverage the available budget authority; or further other policy priorities, as determined by HUD.

f. Mark-to-Market properties. HUD could relax its current restrictions on rent increases for properties that went through the Mark-to-Market (“M2M”) program. Properties that went through this program had their FHA-insured mortgage restructured and Section 8 rents reduced to market. Most properties only received a moderate rehabilitation at the time. The most active years of this program were the early 2000’s, so many of the properties are approaching their 20-year anniversary of the restructuring. These properties were typically subject to 20-year HAP contracts and 30-year Use Agreements. HUD has taken the position that these properties can only receive Operating Cost Adjustment Factor (“OCAF”) increases for the 30-year term of the Use Agreement. However, we believe HUD has the statutory authority to grant budget-based rent increases to these properties if it chose to do so. If the property is located in an area which has seen marked improvement in market conditions since the restructuring HUD could increase rents while still keeping them at or below market. HUD could tie this type of rent increase to a commitment from the owner to make substantial physical improvements to the property. It is plausible that some of these properties are located in Opportunity Zones and this could lead to substantial investment in these assets.

g. RAD PBV to PBRA. The first RAD Second Component conversions were limited to PBV HAP contracts because statutory authority did not yet exist for PBRA conversions in the Second Component. Similarly, many of these early RAD Second Component conversions had limited rents and were constrained to the units that were receiving assistance prior to conversion. Because of these limitations, the investment and development made

possible by these RAD conversions was likewise limited. HUD could allow RAD Second Component projects in Opportunity Zones that converted prior to 2018 to further convert from PBV to PBRA at the rents allowed in the 2018 statutory amendments if the further conversion would result in an additional investment meeting some threshold amount set by HUD. We recommend \$15,000 per unit.

4. Additional suggestions in response to questions posed in FR-6155-N-01.

In HUD request for information in FR-6155-N-01, HUD invited responses on several specific questions. While we believe our suggestions above largely address the questions posed, we offer the following additional suggestions in response to certain specific questions not addressed above:

- a. HUD database. Question 2 stated that HUD is considering creating an information portal on Opportunity Zones. If HUD were to do that we would suggest that it would be beneficial to identify HUD assets in OZ's, such as multifamily assisted buildings, as well as information on other entities administering HUD funding – such as public housing agencies and state and local governmental agencies administering HUD programs in areas covered by Opportunity Zones.
- b. Evaluating impact. Question 6 asked how HUD could properly evaluate the impact of the Opportunity Zone investment. We believe that a number of the suggestions offered above could be easily tracked by information that HUD already receives or otherwise ascertained by HUD's Office of Policy Development and Research ("PD&R") without additional reporting requirement by recipients; for example, the cumulative amount of FHA-insured loans entered into or grants received in Opportunity Zones; the total development costs of projects made possible by rental assistance in Opportunity Zones; the number of building permits pulled in Opportunity Zones. We urge caution, however, that HUD not duplicate the efforts of other agencies or impose additional information collection. We note that as a tax incentive, Opportunity Zone regulation and oversight falls to the Treasury Department. We would be concerned by any separate reporting requirements that HUD might seek to impose. Specifically, HUD should not be evaluating factors relating to aspects of the Opportunity Zones or the Qualified Opportunity Funds, including the economic characteristics of those areas, the incomes of residents or the benefits of investment. These factors relating to the nature of the Opportunity Zone incentive more properly fall within the purview of the Treasury Department, as the agency tasked with implementing the Opportunity Zone incentive. Information collection and evaluation conducted by HUD should be focused on HUD's success in incentivizing investment in those areas and how much investment HUD is able to facilitate and leverage. Duplicative reporting and evaluation requirements would only impose additional administrative burdens and dis-incentivize investment.

NMHC and NAA thank you for considering our views. We hope to work with you to make Opportunity Zones as successful as possible and encourage beneficial private and public investment in economically distressed areas. We would be happy to provide additional information or discuss any of these suggestions further at your convenience. Please feel free to contact Cindy Chetti, NMHC's Senior Vice President of Government Affairs, at 202-974-2300,

or Greg Brown, NAA's Senior Vice President of Government Affairs, at 703-518-6141, should you have any questions.

Sincerely,



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