

NOTE

RADICAL OPTIONS FOR SMALL TOWN PUBLIC HOUSING

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Public housing is one of our country's strongest tools for combatting poverty and homelessness. Operating outside of the private market allows public housing to escape much of the discrimination of private commerce. In addition, public housing's ability to form communities provides many with a type of support otherwise wholly absent from government subsidy programs. However, for years public housing has been devastatingly underfunded. Today, the U.S. Department of Housing and Urban Development is promoting a solution to its underfunding through a new program that would convert this public resource to a private funding scheme. This is the first time any federal public housing redevelopment program has been available to small towns, and it may be the last such opportunity for these communities. This Article explores the strengths and weaknesses of this new program using Charlottesville, Virginia, as a case study for how it could be effectively employed. Charlottesville has gone through many of the common changes and problems of other public housing programs—a racially discriminatory inception followed by decades of neglect. This Article argues that the new program has many problems, but that they are solvable. The program does not adequately protect long term public housing, but creative structuring, like ground leases, could provide a solution. The program also does not provide adequate tenant input, notice, and relocation, but an engaged and active community of tenants could overcome these problems. While the new program is not perfect, many small towns, like Charlottesville, Virginia, cannot afford to wait.

INTRODUCTION

PUBLIC housing is in crisis. The U.S. Department of Housing and Urban Development (HUD) estimates that in November 2014 it provided 1,145,649 public housing units, with an average of 2.2 people per household, in total serving 2,079,606 residents in 965,665 households.¹ Outside these 2 million people served, there are millions more on wait-lists, hoping for a spot to open.² However, the number of public housing

¹ In comparison, there are 1.7 million privately owned units receiving HUD subsidies. DEP'T OF HOUS. & URBAN DEV., RESIDENT CHARACTERISTICS REPORT (November 30, 2014) [hereinafter RESIDENT CHARACTERISTICS REPORT], <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp>.

² E.g., NEW YORK CITY HOUSING AUTHORITY, FACTS ABOUT NYCHA, <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (last visited Dec. 9, 2014). There are 247,262 families on the wait list for public housing in New York City. *Id.* This is sizable considering that as of January 1, 2014 NYC only had 178,557 public housing units. *Id.* See also, RENTAL ASSISTANCE DEMONSTRATION: THE FUTURE OF PUBLIC

units is dwindling, with on average ten thousand units lost and not replaced each year, mainly due to disrepair.³ This is in large part to years of under-funding. Without the financial support to make needed repairs or renovations to the country's public housing units, over time these units degrade until eventually they are no longer livable. The federal government has been slowly abandoning public housing projects, and with them some of the most vulnerable people in society.⁴ Today, HUD estimates that its public housing units are in need of \$26 billion in repairs.⁵ While national programs such as HOPE VI and CHOICE Neighborhoods have combatted depleting housing stocks in major cities around the country,⁶ small cities and towns have had far fewer opportunities for redevelopment.

Today, large grant programs to repair and rebuild public housing have been largely cut and a new conversion program is being pushed as the only solution to redevelopment. As of 2012, Public Housing Authorities (PHAs) are being encouraged to participate in a trial program called Rental Assistance Demonstration (RAD),⁷ through which housing authorities use a combination of private debt and government tax credits to leverage private investors to finance public housing projects. This program converts the revenue that PHAs typically receive for public housing into vouchers, thus stabilizing PHA revenue streams so public housing properties are attractive investments. After converting under RAD, public housing changes substantially in character. Of great concern is the possibility that public housing will lose its public nature altogether through RAD. Thus, many public housing residents and housing advocates see RAD as a threat. This paper will explore how a small town, with Charlottesville, Virginia as a case study, can most effectively use RAD to redevelop. While RAD itself contains several gaps in protec-

HOUSING IN CHARLOTTESVILLE?: A POLICY ANALYSIS FOR THE CITY OF CHARLOTTESVILLE 2 (2014) [hereinafter BATTEN RAD POLICY ANALYSIS] (finding that there are nearly 800 individuals on the waiting list for 371 public housing units in Charlottesville, Virginia); Josh Leopold, *The Housing Needs of Rental Assistance Applicants*, 14 CITYSCAPE 275, 276, http://www.huduser.org/portal/periodicals/cityscape/vol14num2/Cityscape_July2012_housing_needs.pdf ("Although no one knows exactly how many households are currently on public housing or HCVP waiting lists, the number is surely in the millions.").

³ Shaun Donovan, Sec'y, Dep't of Hous. & Urban Dev., Prepared Remarks at Solutions 2013: National Conference on State and Local Housing Policy (Sep. 17, 2013) [hereinafter Sep. 2013 Secretary Donovan Remarks].

⁴ The average annual income of residents in public housing units nationally as of November 2014 is \$14,071, with a whopping 66% of residents as "extremely low income" or below 30% of the median area income. RESIDENT CHARACTERISTICS REPORT, *supra* note 1.

⁵ DEP'T OF HOUS. & URBAN DEV., TOOLKIT #1: WHY RAD? A RENTAL ASSISTANCE DEMONSTRATION (RAD) OVERVIEW 1 [hereinafter WHY RAD?], <http://portal.hud.gov/hudportal/documents/huddoc?id=Toolkit1WhyRAD.pdf>.

⁶ The effectiveness of HOPE VI has been largely criticized. For a discussion of some of its flaws, see *infra* Part V(b).

⁷ This paper will only focus on RAD as it applies to public housing.

tions and rights, these deficits can be remedied through contract and negotiation.

I. A HISTORY OF PUBLIC HOUSING

The public housing program was first created in 1937 through the Wagner Housing Act.⁸ It was designed to provide government-owned, multi-family homes. At its inception, the program was targeted towards offering small buildings—often only two stories⁹—to members of the white working class, which was temporarily unemployed due to the Great Depression.¹⁰ However, after WWII, many of the white working class were able to buy homes of their own, using low-interest mortgages provided by the Federal Housing Administration and Veteran’s Affairs.¹¹ The same loans were unavailable to African Americans and other minorities.¹²

Modern day public housing complexes came to be soon after World War II. The 1949 Housing Act specifically sought urban development, which was referred to as “blight removal” in some circles, and in others explicitly as “negro removal.”¹³ White people had been leaving the cities and new public housing developments strove to remove and reorganize black communities. These factors caused public housing’s demographics to change significantly. For example, while in 1954, 74.9% of federally funded New York City Housing Authority residents were white, by 1969 that number had dropped to only 27.9%.¹⁴ As African Americans and new immigrants moved into cities, and whites (and jobs) left for the suburbs, many looked to public housing as a solution to poor inner-city living conditions.¹⁵ In the next few decades, large-scale “urban renewal” projects leveled many African American neighborhoods. Developers then constructed large, often high-rise public housing units in segregated neighborhoods to accommodate the displaced.¹⁶ These moves as well as

⁸ Pub. L. No. 75-412, 50 Stat. 888 (1937) (currently codified at 42 U.S.C. § 1437(a)-(j) (1982)).

⁹ *Id.* (formerly codified at 42 U.S.C. §§ 1401-1430).

¹⁰ J.A. STOLOFF, A BRIEF HISTORY OF PUBLIC HOUSING 1 (2004), http://reengageinc.org/research/brief_history_public_housing.pdf.

¹¹ *Id.*

¹² This discrimination has been well documented and discussed. See THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 6-72 (1996); BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 1-68, 372-83 (2009).

¹³ Georgette C. Poindexter, *Who Gets the Final No? Tenant Participation in Public Housing Redevelopment*, 9 CORNELL J.L. & PUB. POL’Y 659, 661-62 (2000).

¹⁴ RIGHT TO THE CITY ALLIANCE, WE CALL THESE PROJECTS HOME: SOLVING THE HOUSING CRISIS FROM THE GROUND UP 11 (2010) [hereinafter WE CALL THESE PROJECTS HOME].

¹⁵ STOLOFF, *supra* note 10, at 3.

¹⁶ *Id.* Exclusionary zoning also contributed to the enforcement of segregation through public housing. See generally Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459 (2009).

discriminatory, dehumanizing policies,¹⁷ and slow shifts over time towards limiting the availability of public housing for only the poorest of the poor, changed the role and racial makeup of public housing to where it is now. Today, 45% of public housing resident heads of households are black or African American and 24% are Hispanic or Latino.¹⁸ Furthermore, 13% of residents stay in public housing for over 20 years, 17% for 10-20 years and 19% for 5-10 years. Only 21% of public housing residents stay in public housing for less than one year. The reasons for this are reflected in the income distribution for public housing residents, as 66% are extremely low income, or below 30% of the area's median income.¹⁹

As public housing's racial make-up changed, so did its funding. At their inception, PHAs were designed to be heavily dependent on resident rent payments. As residents grew poorer, PHAs began to fall victim to budget deficits. Housing authorities initially reacted by raising rents. However, after a series of protests including an organized and well-publicized rent strike in St. Louis, the Brooke Amendments in 1969 capped public housing rent to 25% of income (later increased to 30%).²⁰ The Brooke Amendments also brought with them increased tenant participation mandates in an attempt to stymie any further strikes. However, these strides did little to solve public housing's funding crisis.

In 1973, President Nixon withdrew support for public housing programs, putting a halt to the creation of additional units.²¹ Over the next several decades, the federal government has primarily turned its focus away from public housing, instead channeling funds to programs like Section 8 Housing Choice Vouchers, Project-Based Section 8, or the Low-Income Housing Tax Credit Program.²² All three of these programs depend on the private market to provide low-income housing choices, incentivizing private developers and landlords to take low-income tenants by giving subsidies or tax breaks, or guaranteeing rent payments. As the federal government has turned its focus to these private market initiatives, public housing has seen a steady decline in appropriations. Today, HUD estimates that public housing is in need of \$26 billion in repairs.²³ As rent is fixed at 30% of each household's income,²⁴ housing authorities are dependent on federal appropriations and rent to meet their budget needs. The housing authorities are forced to go into deficit when

¹⁷ STOLOFF, *supra* note 10, at 4.

¹⁸ RESIDENT CHARACTERISTICS REPORT, *supra* note 1.

¹⁹ *Id.*

²⁰ Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 695-99 (2012).

²¹ WE CALL THESE PROJECTS HOME, *supra* note 14, at 11.

²² *Id.* at 13 fig.3 (showing that traditional public housing costs substantially less per tenant than the Section 8 Housing Choice Voucher Program, \$6,520 compared to \$7,080).

²³ WHY RAD?, *supra* note 5, at 1.

²⁴ Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (1969) (codified as amended at 12 U.S.C. § 1715z-1a).

Congress slashes their budget. Decades of such underfunding have entrenched public housing in its currently enormous financial deficit.

While the current policy trend is to use private developers to build and oversee low-income housing, Congress has tried in the past to more explicitly privatize public housing. In the 1980s, President Ronald Reagan formed a Commission on Privatization, which issued a report in 1988 on how certain programs, including low-income housing, could be benefited through privatization. The Commission recommended the use of Section 8 vouchers, and said that for HUD's existing public housing program, "[t]o the greatest extent possible existing public housing should either be sold to or managed by the residents."²⁵ In response, Congress attempted, but failed, to pass legislation mandating the sale of public housing units.²⁶

To date, the largest program designed to address public housing's deficit and aging housing stock is Housing Opportunities for People Everywhere (HOPE VI). This program lays a backdrop for why many public housing residents and advocates are wary of RAD.²⁷ HOPE VI was designed to revitalize "severely distressed" public housing into mixed-income developments.²⁸ However, two years after its initial legislation in 1992,²⁹ Congress reauthorized funding for HOPE VI that eliminated its previous requirement of one-for-one replacement. This meant that there was no obligation for housing authorities to replace each unit they tore down. The program originally designated only 72,000 units as "severely distressed," but in all HOPE VI funded the demolition of 155,000 units.³⁰ Only around 50,000 units demolished through HOPE VI have or had plans of being replaced, and as of 2007, only 32,000 had been re-built.³¹ Under the 1998 Quality Housing and Work Responsibility Act, these lost units cannot be regained, as all new creation of public housing units is prohibited. Furthermore, HOPE VI displaced thousands of public housing residents, many of who were never able to return to their communities. This demolition and disruption created a culture of fear among many public housing residents,³² while also increasing the already large need for low-income housing.

²⁵ PRESIDENT'S COMMISSION ON PRIVATIZATION, *PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT* (March 1988), http://pdf.usaid.gov/pdf_docs/PNABB472.pdf.

²⁶ Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 913-14 (1990).

²⁷ While there has been much criticism of HOPE VI by housing advocates, others do applaud the program. *E.g.*, Mindy Turbov, *Public Housing Redevelopment As A Tool for Revitalizing Neighborhoods: How and Why Did It Happen and What Have We Learned?*, 1 NW. J.L. & SOC. POL'Y 167 (2006).

²⁸ WE CALL THESE PROJECTS HOME, *supra* note 14, at 33.

²⁹ Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 102-389, 1993.

³⁰ WE CALL THESE PROJECTS HOME, *supra* note 14, at 33.

³¹ *Id.* at 34.

³² *Id.* at 38.

Today, small town public housing finds itself in a unique situation. Many of HUD's programs today, and over the past few decades, specifically target only larger public housing projects. Congress designed HOPE VI to transform urban high-rise public housing projects,³³ of which small towns rarely built. Other programs have similarly only targeted large cities. For example, the 1992 initiative Moving to Opportunity for Fair Housing only invited twenty-one of the country's largest PHAs to apply and only funded five. Jobs-Plus, a 1998 demonstration program, funded redevelopment in only six urban housing authorities (Baltimore, Chattanooga, Dayton, Los Angeles, St. Paul, and Seattle).³⁴ CHOICE Neighborhoods, a program initiated in 2010, also focused on larger developments, limiting itself to only seventeen cities, which have already been chosen.³⁵ Community Development Block Grants, a very flexible funding program that is one of the longest continuously run HUD programs, can only grant funding for redevelopment to metropolitan cities with certain population minimums.³⁶ Overall, smaller cities have been left out of most prior redevelopment programs. That has resulted in them today containing some of those most severely underfunded public housing programs in the country. RAD is unique in that it is available to smaller-population cities.³⁷ For small town housing authorities that have been watching annual appropriations decrease steadily each year, with no promise of redevelopment grants in the future, it may seem like their only hope.

II. PUBLIC HOUSING IN CHARLOTTESVILLE, VIRGINIA

The history of public housing in Charlottesville, Virginia, is a microcosm of the program's national chronicle. Charlottesville is a small town, with an estimated population of 44,349.³⁸ In the early 1950's, Charlottesville was racially segregated. Most black families lived near the railroad that runs through town, with the densest and worst housing conditions in the black neighborhoods of Vinegar Hill and Cox's Row.³⁹

³³ Salsich *supra* note 20, at 705.

³⁴ *Id.* at 703–04.

³⁵ *Choice Neighborhoods*, DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/cn (last visited Dec. 8, 2014).

³⁶ *Community Development Block Grant Program – CDBG*, DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited Dec. 12, 2014). *See also* 52 U.S.C. §25301

³⁷ HUD reported that as of December 31, 2013, only 15% of RAD applicants were large PHAs (over 1,250 units) with 85% of applicants being of medium or small size (less than 1,250 units). DEP'T OF HOUS. & URBAN DEV., RAD PROGRAM UPDATE slide 9 (Dec. 31, 2013), <http://portal.hud.gov/hudportal/HUD?src=/RAD/info>.

³⁸ U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS (2014), <http://quickfacts.census.gov/qfd/states/51/51540.html>.

³⁹ Christopher S. Combs, *A Community in Turmoil: Charlottesville's Opposition to Public Housing*, 56 MAG. OF ALBEMARLE COUNTY HIST., 1998, at 125. *See also* William

In 1954, the Charlottesville Redevelopment and Housing Authority (CRHA) was established and controversy erupted over whether public housing should be introduced in Charlottesville.⁴⁰ However, *Brown v. Board* and a subsequent court ruling in 1958 ordering school desegregation in Charlottesville changed the public housing debate into one of race. Soon after desegregation was ordered, Charlottesville's city council requested a loan for urban renewal in the Vinegar Hill neighborhood area. City leaders wished to remove what they saw as a slum, and build in its stead an expanded business district.⁴¹ However, federal law required that before demolishing Vinegar Hill, the city needed to build public housing for the displaced population. A desire for "urban renewal" in Vinegar Hill spurred many white residents to support the building of public housing. A series of citywide referenda followed, seeking approval for construction of various public housing projects. These referenda took many years, as white residents fought the construction of black housing projects near white homes.⁴² Eventually, the city successfully demolished the Vinegar Hill neighborhood and construction of Westhaven began, Charlottesville's first public housing project.⁴³ As Charlottesville's oldest public housing complex, Westhaven was completed in 1965.⁴⁴ Its location maintained segregation within the city, as did the locations of all subsequent projects. CRHA's five other projects were constructed between the 1970's and 1981, and as Charlottesville's public housing currently stands, none of its complexes have undergone any major renovation since their creation. Today, the destruction of Vinegar Hill stands as a symbol of white oppression against black Charlottesville residents. Many people in Charlottesville see the history of the city's urban renewal and construction of public housing as a bulldozing of black communities and active preservation of segregation.⁴⁵ Today, Vinegar Hill is a

M. Harris, Sr. & Nancy Olmsted, *Public Housing in Charlottesville: The Black Experience in a Small Southern City*, 46 THE REV. OF BLACK POL. ECON. 29 (1988), <http://www2.iath.virginia.edu/schwartz/vhill/harris.html>.

⁴⁰ Combs, *supra* note 39, at 121.

⁴¹ *Id.* at 130.

⁴² *Id.* at 131 ("The existence of a housing project for poor blacks in the neighborhood threatened these citizens' largest financial investment—their homes, and with the threat to the home came the threat to the neighborhood."). See also *Id.* at 137 ("[R]esidents adopted a 'not in my neighborhood' stance to the issue.").

⁴³ *Id.* at 140–141. It is important to note that when Vinegar Hill was destroyed most all of the people directly affected by the decision were precluded from participating in the vote by a poll tax. See *Vinegar Hill, A Forgotten Neighborhood*, CHARLOTTESVILLE.ORG, <http://www.charlottesville.org/Index.aspx?page=1990> (last visited July 31, 2015).

⁴⁴ Combs, *supra* note 39, at 118. Note that the overall median age for the public housing stock in the United States is 1974. See U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY, <http://www.census.gov/programs-surveys/ahs/data.html>.

⁴⁵ Combs, *supra* note 39, at 152–153. See also Graham Moomaw, *Charlottesville Officially Apologizes for Razing Vinegar Hill*, THE DAILY PROGRESS, Nov. 7, 2011, http://www.dailyprogress.com/news/charlottesville-officially-apologizes-for-razing-vinegar-hill/article_83b8aed4-2f4a-5ee2-baaa-2e7c9d43c2b0.html. See generally THAT

ghost, haunting residents in their discussions of public housing and redevelopment.

While Charlottesville's experience has been similar to that of many small towns around the country, it is unique in that it has a highly organized and nationally recognized Resident Advisory Board, the Charlottesville Public Housing Association of Residents (PHAR). PHAR was founded in 1998 and is made up entirely by and for public housing residents.⁴⁶ It operates an internship program and runs a HUD-funded Service Coordination Program. PHAR is also extremely active in organizing for the protection and improvement of public housing communities in Charlottesville. In 2013, with the help of Charlottesville's Legal Aid Justice Center, PHAR residents filed a federal lawsuit to challenge utility surcharges.⁴⁷ Most relevant here, PHAR has been an active participant in discussions and advocacy around redevelopment of CRHA public housing.

Public housing in Charlottesville is in a state of disrepair, replete with mold problems, broken elevators, and old, battered buildings. However, PHAR and CRHA have not reached a consensus on how to solve these problems. In 2008, PHAR advocated for and had passed a "Residents' Bill of Rights for Redevelopment," which outlined the major redevelopment concerns of PHAR residents.⁴⁸ Although not legally binding,⁴⁹ the Bill of Rights was unanimously passed by CRHA and the City of Charlottesville. The Bill of Rights states a public commitment to ensuring that redevelopment go smoothly and without loss of units or communities. Unfortunately, this camaraderie about public housing redevelopment between CRHA and PHAR proved short-lived. In 2013, CRHA made moves to apply for RAD redevelopment and PHAR organized in response, actively opposing CRHA's plans.⁵⁰ PHAR criticized CRHA for not properly informing public housing residents of the intricacies of the RAD program and for CRHA not knowing enough about

WORLD IS GONE: RACE AND DISPLACEMENT IN A SOUTHERN TOWN (Virginia Center for Digital History 2010) [hereinafter THAT WORLD IS GONE]. In 1989, 70.1% of public housing heads of household in Charlottesville were black, and 84% of the children living in public housing are black. Harris & Olmsted, *supra* note 39.

⁴⁶ PHAR CVILLE, <http://www.pharcville.org> (last visited Dec. 12, 2014).

⁴⁷ Bryan McKenzie, *Charlottesville Public Housing Residents Sue Over Utility Charges*, THE DAILY PROGRESS (Jan. 23, 2013), http://www.dailyprogress.com/news/charlottesville-public-housing-residents-sue-over-utility-surcharges/article_95abaa11-54df-545b-b226-a2347e70ea19.html.

⁴⁸ Charlottesville, Va., Residents' Bill of Rights for Redevelopment (Nov. 24, 2008), <http://www.pharcville.org/wp-content/uploads/2014/05/Residents-Bill-of-Rights-for-Redevelopment.pdf> [hereinafter Residents' Bill of Rights].

⁴⁹ There are at least two other examples of public housing groups organizing for similar agreements. See Poindexter, *supra* note 13, at 672 (describing an agreement between residents of the East Lake Meadows tenant community and their local housing authority, outside Atlanta, Georgia and mentioning its similarity to one other agreement).

⁵⁰ *RAD Initial Comments and Questions*, PHAR CVILLE (Oct. 28, 2013), <http://www.pharcville.org/2013/10/29/no-r-a-d-in-2013-comments-from-oct-28/> [hereinafter PHAR RAD Initial Comments].

the program themselves.⁵¹ CRHA did not apply for RAD in 2013, and although discussions of a RAD application continued into 2014, they have not yet applied.⁵² However, CRHA's most recent draft of its 5-Year and Annual Plans anticipates "using the RAD program as a potential means to redevelop the aging housing stock after planned board and community training."⁵³ Therefore, there is little doubt that CRHA plans to redevelop using RAD in the near future.

Making matters more complicated, Charlottesville's current public housing developments are located in areas that have become extremely valuable, both in terms of rising property values and the appealing proximity to the University of Virginia. For example, Charlottesville's public housing complex for the elderly and disabled, Crescent Halls, is located walking distance to the downtown mall, a mainstay of some of the city's most popular and thriving restaurants and businesses.⁵⁴ Many public housing tenants fear that they will be forced to move from their current homes and communities to make way for businesses or other property developments that the city deems more valuable: a veritable repeat of Vinegar Hill.⁵⁵

III. WHY PUBLIC HOUSING MATTERS

While there is little doubt that redevelopment is necessary, it is essential that redevelopment in Charlottesville, like in many cities in the country, be done cautiously and carefully. As referenced earlier, many of CRHA's units suffer from inefficient utilities, exposed plumbing, accessibility problems, broken appliances and general compliance violations.⁵⁶ Estimates for the cost of redevelopment in Charlottesville vary from \$31,512 per unit to \$140,317 per unit, both of which are impossible for CRHA to fund without a RAD conversion.⁵⁷ However, any redevelopment must take into account the interests of residents and the crucial

⁵¹ *Id.*

⁵² At the time of this paper's completion, CRHA would have only two weeks left in the year to apply for RAD and at the time of writing, CRHA had not completed all the necessary steps in community education required prior to application.

⁵³ Charlottesville Residential and Housing Authority, Proposed Annual and Five-Year Plans, 11/2014 Regular Board Meeting, Packet, <http://www.charlottesville.org/Index.aspx?page=28>.

⁵⁴ *Charlottesville's Downtown Mall: At the Heart of the City*, CITY OF CHARLOTTESVILLE, <http://www.charlottesville.org/index.aspx?page=177> (last visited Dec. 12, 2014).

⁵⁵ PHAR RAD Initial Comments, *supra* note 50 ("There will be no PHAR support of a RAD application with the following uncertainties left unaddressed: . . . Enforceable commitments that public housing sites will remain where they are." "UVA has a growth plan, known by the city of Charlottesville, that seeks to have the housing market address student, faculty and staff housing close to the University. While this may not be in the immediate plans, decades down the road the property at Westhaven will be especially enticing to developers.").

⁵⁶ BATTEN RAD POLICY ANALYSIS, *supra* note 2, at 4.

⁵⁷ *Id.* at 16.

role that public housing plays for low-income households. The public housing program fills a void in the country's housing market for truly affordable homes that provide stability and community, free from outside forces like discrimination or economic pressures.

The private market has proven many times over that in its current state it does not, and seemingly cannot, provide stable, low-income housing. Limited private housing options forced more than 8 million renter households to pay more than half of their income for rent and basic utilities in 2007.⁵⁸ Of these renters, almost all were low-income (at or below 80% of their state's median income) and two-thirds were extremely low-income (below 30% of the state median income, or roughly at the federal poverty line). Many of these households are working households,⁵⁹ and thirty-eight percent of them are families with children.⁶⁰ This illustrates a profound lack of affordable housing on the private market. Furthermore, these calculations do not take into account homeless individuals,⁶¹ of which HUD calculated there were over 600,000 in 2013, one quarter of whom are children.⁶² In total, the 2010 census showed that fifteen percent of the United States (46 million people) is living below the poverty line (\$22,000/year for a family of four).⁶³ For many of these individuals, finding and keeping housing is a constant battle. In Congress's own words, public housing is necessary to support low-income families where private enterprise has failed "to build an adequate supply of decent, safe, and sanitary dwellings."⁶⁴

In terms of government-funded responses to private market failures, preserving public housing is also the most cost-effective, and for certain marginalized groups, the only way to provide low-income housing. Preserving and rehabilitating public housing is significantly more cost effective than replacing our current system with alternative forms of low-income housing.⁶⁵ Furthermore, public housing is unique in its ability to serve low-income residents without fear of discrimination from the pri-

⁵⁸ Douglas Rice & Barbara Sard, *Decade of Neglect has Weakened Federal Low-Income Housing Programs: New Resources Required to Meet Growing Needs*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Feb. 24, 2009), <http://www.cbpp.org/sites/default/files/atoms/files/2-24-09hou.pdf>.

⁵⁹ *Id.*

⁶⁰ See NAT'L LOW INCOME HOUS. COAL., 2011 ADVOCATES' GUIDE TO HOUSING & COMMUNITY DEVELOPMENT POLICY 164–65, at 5 (2011), <http://nlihc.org/sites/default/files/2011-Advocates-Guide.pdf> (38% of households in the renters market comprise families with children).

⁶¹ Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 36 (2014).

⁶² DEP'T OF HOUS. & URBAN DEV., 2013 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS, 1 (2013), <https://www.hudexchange.info/resources/documents/ahar-2013-part1.pdf>.

⁶³ Alemayehu Bishaw, *Changes in Areas with Concentrated Poverty, 2000-2010*, AM. COMMUNITY SURV. REP. (June 2014), <https://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-27.pdf>.

⁶⁴ 42 U.S.C. § 1402(2) (1958) (current version at 42 U.S.C. § 1437a(b)(2) (2006)).

⁶⁵ Smetak, *supra* note 61, at 41.

vate market. The Low-Income Housing Tax Credit Program, Section 8 Housing Choice Vouchers, and even private market project-based programs have had longstanding problems of discrimination against their participants.⁶⁶ There are many examples of discrimination both against Section 8 project-based housing complexes, and against individuals who seek apartments through the Section 8 Housing Choice Voucher Program.⁶⁷ This discrimination is even legal. In total, thirty-eight states, including Virginia, allow discrimination against voucher-holders.⁶⁸ While all voucher holders are encumbered by source-of-income discrimination,⁶⁹ several studies and reports show that this burden is exponentially greater for people of color.⁷⁰ Public housing is the only program that alleviates failures of the private market to supply low-income housing in a non-discriminatory fashion. Particularly considering the United States' execrable past in its treatment of minority communities, and especially black communities, to ignore the realities of ever-present racism in the housing market would be a grave injustice.⁷¹

In comparison to other federal housing subsidies, the public housing program is also relatively inexpensive. In particular, one of the federal government's largest housing subsidy programs, the Low-Income Housing Tax Credit Program, has been widely criticized for its inefficiency. Predictably, the process of administering low-income housing through the tax code is rife with problems.⁷² With the 2012 public housing budget of \$5.9 billion, and the \$25 billion total backlog of needed repairs to

⁶⁶ Salsich, *supra* note 20, at 730–34; Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1013 (1998) (discussing how the Low-Income Housing Tax Credit Program is both one of the federal government's largest low-income housing programs, and one of its most effective at maintaining segregation).

⁶⁷ Salsich, *supra* note 20, at 730–34

⁶⁸ Only 12 states and 31 cities ban source of income discrimination in the housing market. See Jessica Luna & Josh Leopold, *Landlord Discrimination Restricts the Use of Rental Vouchers*, URBAN WIRE, <http://www.urban.org/urban-wire/landlord-discrimination-restricts-use-rental-vouchers>.

⁶⁹ See Jenna Bernstein, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1411 (2010).

⁷⁰ See LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS, *THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY* (2008), http://www.civilrights.org/publications/reports/fairhousing/emerging.html#_ednref311 (highlighting a number of studies, including one that found “discrimination against voucher holders was widespread and that discrimination was more pronounced when the voucher holder was Black.”); John C. Weicher, *The Voucher/Production Debate* 4, 18 (M.I.T. Housing Policy Project, HP #13, April 1988).

⁷¹ Even among critics of the public housing program, the unique position of public housing as a bulwark against housing discrimination is recognized. See, e.g., Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 894 (1990) (“Nevertheless, construction of public housing may be desirable under certain market conditions, including those markets subject to artificial entry barriers and discrimination.”).

⁷² See, e.g., David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 557 (1998).

public housing units, public housing may seem expensive. However, considering the federal government gave \$131 billion in 2012 in home mortgage tax deductions, public housing is a relatively small budget line.⁷³ Furthermore, of those receiving mortgage tax deductions, a majority of households has incomes between \$100,000 and \$500,000. The money spent on subsidizing middle and upper class housing thus dwarfs that spent on low-income housing and on the public housing program.⁷⁴

Lastly, public housing is an important program because it offers unique benefits over other low-income housing options. Unlike programs that place low-income residents in disparate locations, public housing forms communities.⁷⁵ Research does not support that de-concentration of poverty leads to more successful lives for low income people.⁷⁶ In contrast, for many, the friends and communities they have found through public housing have been an indispensable asset.⁷⁷

IV. THE RENTAL ASSISTANCE DEMONSTRATION (RAD) PROGRAM

RAD is a 2012 Obama Administration initiative that in its current form will span until July 1, 2018.⁷⁸ To address both declining congressional appropriations and an ever-growing need for funds to repair and redevelop an aging housing stock, RAD allows PHAs to use their housing as a resource by encouraging them to mortgage and invest in public housing.⁷⁹ Importantly, the program also involves the conversion of pub-

⁷³ Smetak, *supra* note 61, at 44.

⁷⁴ Not to mention, the government gave over \$200 billion in bank bailouts in 2009. *Bailed Out Banks*, CNN MONEY, <http://money.cnn.com/news/specials/storysupplement/bankbailout/> (last visited Dec. 12, 2014). As an additional comparison, the Navy's new Gerald R. Ford (CVN-78) class of nuclear-powered aircraft carriers cost about \$12 billion each in just procurement costs. RONALD O'ROURKE, CONG. RESEARCH SERV., RS20643, NAVY FORD (CVN-78) CLASS AIRCRAFT CARRIER PROGRAM: BACKGROUND AND ISSUES FOR CONGRESS, (2014), <https://www.fas.org/sgp/crs/weapons/RS20643.pdf>.

⁷⁵ WE CALL THESE PROJECTS HOME, *supra* note 14, at 13.

⁷⁶ *Id.*; see generally Thomas C. Kost, *Hope After Hope VI? Reaffirming Racial Integration As A Primary Goal in Housing Policy Prescriptions*, 106 NW. U. L. REV. 1379 (2012).

⁷⁷ HUMAN IMPACT PARTNERS, ADVANCEMENT PROJECT & NATIONAL PEOPLE'S ACTION, THE RENTAL ASSISTANCE DEMONSTRATION PROJECT: A HEALTH IMPACT ASSESSMENT 8–9 (2012).

⁷⁸ Consolidated and Further Appropriations Act of 2012, Pub. L. No. 112-55, tit. II, 125 Stat. 672222 (2011) [hereinafter RAD Appropriations Act]; DEP'T OF HOUS. & URBAN DEV., PIH-2012-32 (HA), Rental Assistance Demonstration—Final Implementation (July 26, 2012). HUD initially revised its notice on July 2, 2013, and made a technical correction on February 6, 2014. See DEP'T OF HOUS. & URBAN DEV., PIH-2012-32 (HA), REV-1, Rental Assistance Demonstration—Final Implementation, Revision 1 (July 2, 2013) [hereinafter Revised RAD Guidance July 2, 2013]. As the program continues to expand, HUD made still additional changes in a June 2015 notice. DEP'T OF HOUS. & URBAN DEV., PIH-2012-32 (HA), REV-2, Rental Assistance Demonstration—Final Implementation, Revision 2 (June 15, 2015) [hereinafter Revised RAD Guidance-2 June 15, 2015].

⁷⁹ Revised RAD Guidance July 2, 2013, *supra* note 76, at 22 (“[O]ne of the main purposes of RAD is to demonstrate how the conversion of current assistance to two dif-

lic housing units to either Project Based Vouchers (PBV) or Project Based Rental Assistance (PBRA).⁸⁰ Under RAD, these revenue streams entirely replace a PHAs' capital funds and operating funds, which with tenant rental payments are the traditional funding sources of public housing. Both PBRA and PBV have the same rent scheme as public housing and serve similar demographics.⁸¹ The benefit of switching to these programs is that they allow public housing's funding streams to be locked into their current level under a contract, rather than being dependent on year-to-year appropriations. This stabilizes funding and incentivizes outside investment. HUD also specifically allows that ownership of public housing may be transferred, at least partially, to a private entity, so as to facilitate the use of tax credits,⁸² but only if the housing authority maintains some interest in the property.⁸³ HUD predicts that RAD will be able to bring \$6 billion of private outside investment into redeveloping public housing.⁸⁴ By locking in funding, PHAs are also incentivized to apply for RAD as early as possible, as many face severe deficits, and appropriations for public housing continue to fall each year.⁸⁵ While the RAD program currently only authorizes conversion of 185,000 units, Congress will likely raise this cap, and the program will prove to be an expansive

ferent forms of long-term, project-based Section 8 rental assistance contracts can generate access to private debt and equity . . .").

⁸⁰ These two programs are largely similar, but they most obviously differ in administration. Under a PBV conversion, the project is administered by the agency to whom the vouchers are assigned, which in most cases will be the relevant PHA. In contrast, PBRA properties are administered by HUD's Office of Housing. *See Revised RAD Guidance July 2, 2013, supra note 78, at 19.*

⁸¹ DEP'T OF HOUS. & URBAN DEV., OVERVIEW OF THE RENTAL ASSISTANCE DEMONSTRATION (RAD) PROGRAM slide 6 (June 2014), [hereinafter HUD Overview of RAD Program], http://portal.hud.gov/hudportal/documents/huddoc?id=RADPROG_062414.pdf.

⁸² The shift in ownership is necessary, as only a private entity would be able to take advantage of the Low Income Housing Tax Credit Program, as to be advantaged one must pay taxes.

⁸³ Revised RAD Guidance July 2, 2013, *supra note 78, at 35, 48.* Some cities have already taken advantage of this opportunity for private investment, to much backlash. *E.g. Right to Housing Alliance, A RAD-ical Housing Experiment: In These Times Article on RAD in Baltimore*, RIGHT TO HOUSING ALLIANCE BALTIMORE (July 20, 2014), <http://rthabaltimore.org/2014/07/a-rad-ical-housing-experiment-in-these-times-article-on-rad-in-baltimore/>; Mark Reutter, *Housing Advocates Seek Details About Plan to Privatize Public Housing*, BALTIMORE BREW, March 7, 2014, <https://www.baltimorebrew.com/2014/03/07/housing-advocates-seek-details-about-plan-to-privatize-public-housing/>.

⁸⁴ HUD Overview of RAD Program, *supra note 79, at slide 7.* HUD provides a number of restrictions to what kinds of debt PHAs can take on. *See Revised RAD Guidance July 2, 2013, supra note 78, at 24.*

⁸⁵ Revised RAD Guidance July 2, 2013, *supra note 78, at 36*; BATTEN RAD POLICY ANALYSIS *supra note 2, at 17* (showing annually declining operating funds of both HUD and CRHA).

one.⁸⁶ As its name suggests, RAD is designed to “demonstrate” that these conversions can be a larger solution to HUD’s housing crisis.⁸⁷

Predecessors to RAD began to appear in HUD proposals as early as 2003. In 2003 and 2004, HUD proposed a Public Housing Reinvestment Initiative that would shift funding of public housing to private sector mortgage financing.⁸⁸ Congress did not fund the initiative and the Bush Administration did not further pursue it. In February 2010, Congress picked the project back up with Transforming Rental Assistance (TRA), which required \$250 million in appropriations. After TRA failed to pass, Congress next tried Preservation, Enhancement, and Transformation of Rental Assistance (PETRA) in May 2010, which similarly did not succeed. In December 2010, Congress drafted the Rental Housing Revitalization Act, which, in February 2011, became Rental Assistance Demonstration (RAD). Finally, in November 2011, FY12 appropriations authorized RAD.⁸⁹ The major change between these three programs is that RAD in its current form is theoretically budget-neutral.⁹⁰

The timeline for RAD is fairly swift. First, a PHA submits an application to HUD for the conversion of public housing units. Upon approval, HUD issues an award letter, asking the PHA to sign a Commitment to Enter into a Housing Assistance Payment Contract (CHAP).⁹¹ Within 30 days after receiving a CHAP, the PHA must submit to HUD a letter from a lender committing to financing the project and detailing the lender’s anticipated loan provisions, as well as a letter from a developer describing the developer’s credentials.⁹² All PHAs are required by HUD to have annual and five year plans.⁹³ RAD conversions require amendments to a PHA’s plans.⁹⁴ The PHA must next make these amendments within 60 days of receiving a CHAP, and inform HUD if it will be choosing a

⁸⁶ Letter from HUD Secretary Shaun Donovan to Executive Directors (Feb. 20, 2014). Originally, only 60,000 units were authorized to be converted. However, this cap was raised in a 2015 appropriations act after the original spots filled so quickly. In December 2014, before the cap was raised, all 60,000 original spots had been claimed and there were 116,025 units on the RAD waiting list, or about 10 percent of the nation’s public housing stock. ECONOMETRICA, INC. FOR DEP’T OF HOUS. & URBAN DEV., STATUS OF HUD’S RENTAL ASSISTANCE DEMONSTRATION (RAD) EVALUATION AND RESULTS TO DATE 1, http://www.huduser.org/portal/publications/pdf/RAD_Evaluation.pdf. There is actually a coalition of individuals, businesses, and housing authorities organized by Bennett Group Consulting that is actively lobbying to have the RAD cap lifted. *Lift the RAD Cap Coalition*, BENNETT GROUP CONSULTING, <http://www.bennettgroupconsulting.com/lift-the-rad-cap-coalition> (last visited Dec. 12, 2014).

⁸⁷ Revised RAD Guidance July 2, 2013, *supra* note 78, at 5 (“RAD provides the opportunity to test the conversion of public housing and other HUD-assisted properties to long-term, project-based Section 8 rental assistance . . .”).

⁸⁸ Salsich, *supra* note 20, at 711–12.

⁸⁹ See RAD Appropriations Act, *supra* note 78.

⁹⁰ Revised RAD Guidance July 2, 2013, *supra* note 78, at 18.

⁹¹ *Id.* at 77.

⁹² *Id.* at 77–78.

⁹³ 24 C.F.R. § 903 (2015).

⁹⁴ Revised RAD Guidance July 2, 2013, *supra* note 78, at 30–31.

PBRA or PBV conversion.⁹⁵ Additionally, the PHA must complete a series of other forms and commitments in different stages for the next 360 days before the final stage of the process can occur.⁹⁶

At closing, a Housing Assistance Payment (HAP) contract and Use Agreement are executed. The Use Agreement contains tenant income restrictions and attaches to the property itself, while the HAP contract ensures funding between HUD and the PHA or another developer. HAP contracts are used in PBV and PBRA funding schemes outside of the RAD context. However, unlike with traditional PBV and PBRA housing units, under RAD, owners and PHAs *must* renew their HAP contracts at least once. The Use Agreement automatically renews with each HAP renewal.⁹⁷ The key to the Use Agreement's enforceability is its position as a first lien.⁹⁸ Under RAD conversion, this initial lien is required to be superior to all other property liens, and thus it survives with the property unless released by HUD. Under a PBV system, the initial HAP contract is renewed every 15 years, and under PBRA, every 20.⁹⁹ In each of these systems, the first renewal is mandatory, with only a few exceptions, and thus these two contracts together safeguard long-term affordable housing for the next thirty to forty years.

There is nothing obviously menacing about RAD. HUD has stated that RAD's goals are "the preservation and improvement of these [public housing] properties through enabling access by PHAs and owners to private debt and equity to address immediate and long-term capital needs."¹⁰⁰ These are certainly worthwhile goals. However, converted units under RAD lack many of the protections and guarantees of the current public housing system. Without these protections, the wellbeing of many public housing residents is at risk. Former HUD Secretary Shaun Donovan has recognized the prodigious shift in affordable housing that RAD can potentially make, saying, "RAD represents more than just a new way of preserving and improving affordable housing for future generations. It represents a sea change in how the Federal government partners with communities and the private sector."¹⁰¹

V. WEAKNESSES OF RAD

Overall, there are many mechanisms within RAD that protect current public housing residents, but there are still some significant gaps. Under RAD, current public housing residents cannot be put through a re-

⁹⁵ *Id.* at 78.

⁹⁶ *Id.* at 78–82.

⁹⁷ *Example of Rental Assistance Demonstration Use Agreement, Whereas Clause and Sec. 2*, U.S. DEP'T OF HOUS. & URBAN DEV., [hereinafter Use Agreement] <http://portal.hud.gov/hudportal/documents/huddoc?id=UseAgreement.docx>.

⁹⁸ *Id.*; see also Revised RAD Guidance July 2, 2013, *supra* note 78, at 15, 35, 48.

⁹⁹ A PBV, however, may be amended to renew every 20 years as well. Revised RAD Guidance July 2, 2013, *supra* note 78, at 19.

¹⁰⁰ *Id.* at 5.

¹⁰¹ Sep. 2013 Secretary Donovan Remarks, *supra* note 3.

screening process, and RAD contains a requirement that any units knocked down during redevelopment, for the most part, must be replaced. Furthermore, if a development goes bankrupt, any new purchasing party is still subject to the terms of the Use Agreement. However, these protections are not enough. There are two primary weaknesses to redevelopment through RAD. First, RAD contains limited requirements that tenants be consulted in the planning of a conversion. This is particularly troubling in light of the compulsory relocation implicit in many RAD conversions. Second, because of the fragility of RAD's HAP agreements, the program may falter when it comes to preserving low-income housing communities in the long term.

A. Tenant Input, Notice and Relocation

One of RAD's flaws is its lack of attention to tenant input and participation. In its current form, RAD lacks specificity and oversight in its notification requirements. This becomes problematic for several reasons, but most profoundly in the context of any requisite relocation.

Former demolition and disposition public housing policies required extensive details and notification requirements in the application stage.¹⁰² Originally, RAD contained only a bare minimum of notification requirements. Luckily, in HUD's latest June 2015 notice, it amended RAD's notification standards, now mandating greater tenant input. Even so, the RAD process still leaves room for abuse. Currently, before submitting an application to participate in RAD, PHAs are required to 1) notify residents of affected projects; 2) notify any legitimate resident organizations of their intent to pursue a conversion; 3) conduct at least two meetings with residents of projects proposed for conversion to discuss plans and provide opportunity for comment; and 4) prepare "comprehensive written responses" to any comments received in connection with the required resident meetings on the proposed conversion which must be submitted with their RAD application.¹⁰³ When making the necessary amendments to its annual and five-year plans as part of its RAD application process, a PHA must hold one additional meeting.¹⁰⁴ After a PHA is accepted to participate in RAD, it must then only hold one more meeting before HUD executes a HAP contract.¹⁰⁵ If there is a "substantial change" to the PHA's conversion plans, they must hold still another additional meeting,¹⁰⁶ and after committing to conversion, PHAs are required to "inform households of the specific rehabilitation or construction plans and any impact the conversion may have on them."¹⁰⁷ While

¹⁰² Notice requirements for Demolition and Disposition under § 18 are codified at 42 U.S.C. § 1437p (a)(4) (1998).

¹⁰³ Revised RAD Guidance-2 June 15, 2015, *supra* note 78, at 78.

¹⁰⁴ *Id.*; 24 C.F.R. § 903.17.

¹⁰⁵ Revised RAD Guidance July 2, 2013, *supra* note 78, at 62.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

PHAs are required to hold many meetings, these meeting requirements lack specificity and have no required enforcement mechanisms were a housing community to disapprove of a PHA's planned conversion.

One can see how these issues in RAD's notice requirements are problematic by looking at how Charlottesville interpreted and implemented them. In 2013, CRHA leapt at the opportunity through RAD to lock in its subsidy rates for years to come. Starting in early October, CRHA quickly put together community presentations on RAD, hoping to complete its notification requirements in time to apply before the end of December.¹⁰⁸ While CRHA did not succeed, nor has it yet to apply for RAD, that a public housing authority could entirely transform its housing portfolio to one devoid of public housing in only 2 to 3 months demonstrates the lack of required community involvement in a RAD conversion.¹⁰⁹ Furthermore, the meetings that CRHA did organize were cursory, glancing over details and leaving many residents with serious questions and concerns. Because RAD leaves discretion with PHAs as to what precisely they communicate to their residents about an upcoming conversion, even the most superficial of meetings will fulfill the program's requirements.

Worsening this problem, if a community objects to a PHA's plans, there is little enforcement mechanism for such an objection. While PHAs must "[p]repare comprehensive written responses to comments received in connection with the required resident meetings," there is nothing requiring that these comments be taken into consideration, or that in the face of opposition an application be delayed or terminated.¹¹⁰ In fact, HUD explicitly rejected requests for changes to the RAD program so that strong resident dissatisfaction could serve as a basis for denial of a RAD proposal.¹¹¹

The lack of resident participation in RAD is especially worrying in the context of any relocation, specifically where residents will go during any period of construction to their current unit.¹¹² The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

¹⁰⁸ *CRHA to End Public Housing This Month? RAD is Coming!*, PHARCVILLE (Oct. 8, 2013), <http://www.pharcville.org/2013/10/08/crha-to-end-public-housing-this-month-rad-is-coming/>; Aaron Richardson, *Concerns Raised About Public Housing Pilot Program*, THE DAILY PROGRESS, Nov. 16, 2013, http://www.dailyprogress.com/news/concerns-raised-about-public-housing-pilot-program/article_dbd918c4-4f1b-11e3-b7b4-0019bb30f31a.html.

¹⁰⁹ CRHA is not alone in attempting to apply for a RAD conversion with very little community input. See Gary Stroud & Anthony Coates, *Selling Off and Selling Out*, THE BALTIMORE SUN, April 30, 2014, <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-public-housing-20140430-story.html>.

¹¹⁰ See Revised RAD Guidance-2 June 15, 2015, *supra* note 78, at 78–80.

¹¹¹ National Housing Law Project, *HUD Guidance Clarifies Tenant Protections in the Rental Assistance Demonstration*, 43 HOUSING L. BULL. 9, 11 (2013), http://nhlp.org/files/1373655699_9-16_HUD_Guidance.pdf.

¹¹² PHAR RAD Initial Comments, *supra* note 50 (“[I]t [relocation] is the number one concern outside of ‘right to return’ that residents have.”).

(URA) governs most RAD conversions.¹¹³ In all, the URA does provide a number of guarantees to ensure that residents' transitions go smoothly. First, residents cannot be made to move unless they have been given an opportunity to find a "comparable replacement dwelling."¹¹⁴ "Comparable housing" is defined to include a number of desirable attributes, including most importantly that the new housing must be "in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment."¹¹⁵ The URA also guarantees that relocated households have a right to return to their original unit, and that they be provided counseling, new housing recommendations and reimbursed moving expenses.¹¹⁶ However, the URA only requires that displaced households be given ninety days notice of any forced relocation.¹¹⁷ Because RAD allows housing authorities to have redevelopment plans set in place before giving any individual notice, under RAD it is thus entirely possible for a household to learn that they need to relocate a mere 90 days before they must vacate.

The goal of any relocation plan should be to make it as minimally disruptive as possible. This involves a highly detailed knowledge of the affected community, the people living there and their individual needs. This is the kind of knowledge that perhaps *only* public housing residents themselves possess. The seriousness of displacement of public housing communities is underscored by the country's urban renewal past. Many of the individuals living in public housing today are the product of poor housing policies of the past half-century. Some public housing residents even remember when these wounds were inflicted.¹¹⁸ To exclude these voices from redevelopment decisions is to risk making the same mistake twice.

B. Long-Term Preservation of Low-Income Housing

It is extremely important that low-income housing be preserved for years to come. Unfortunately, the RAD program is written such that units can be lost during conversion. Even after conversion, units can be radically changed in nature as a result of a foreclosure or termination of a HAP agreement.

Under the RAD program, a de minimis number of units, up to the greater of five percent or five units, may be lost during conversion and not replaced.¹¹⁹ Some additional exceptions also apply.¹²⁰ While HUD

¹¹³ See Revised RAD Guidance July 2, 2013, *supra* note 78, at 24.

¹¹⁴ 42 U.S.C. § 4624(a) (2012).

¹¹⁵ 42 U.S.C. § 4601(10) (2012); 49 C.F.R. § 24.2(6) (2015).

¹¹⁶ 42 U.S.C. § 4622(a)(1) (2012).

¹¹⁷ 49 C.F.R. § 24.203(c) (2015).

¹¹⁸ THAT WORLD IS GONE, *supra* note 45 (showing interviews with Charlottesville residents who remember and still miss Vinegar Hill).

¹¹⁹ Revised RAD Guidance July 2, 2013, *supra* note 78, at 29.

specifies that no residents may be permanently and involuntarily displaced by the demolition of any units, including those demolished pursuant to a de minimis or other exception, the loss of five percent of all public housing units is still a significant loss in available affordable housing. Originally, any redevelopment of public housing required one for one replacement of any demolished units, but this was suspended in 1995 to allow for HOPE VI redevelopment, was later formally repealed in 1998, and has never been reinstated.¹²¹

Perhaps the most worrying aspect of RAD is the possibility that former public housing units will end up becoming privately owned, and in the case of foreclosure or other cause for termination of the HAP agreement, a private developer could take advantage of the lax income requirements of the Use Agreement. While Shaun Donovan, the former Housing Secretary, released a statement about PETRA, claiming that “[w]hat this bill won’t do is ‘privatize public housing,’”¹²² many fear that RAD will do just that. Under the RAD statute, it is possible for a private developer, in collaboration with the Low Income Housing Tax Credit Program, to own units upon conversion.¹²³ Furthermore, in the case of “foreclosure, bankruptcy, or termination and transfer of assistance for material violations of, or default under, the HAP contract” even converted units that had remained publically owned can be allowed to pass to a private actor.¹²⁴ Ownership or control of converted units in such a situation is supposed to first go to a public entity, and only if necessary, then a non-public entity.¹²⁵

Private ownership is worrisome because the history of public housing has shown how privatization without adequate government control or

¹²⁰ Units may also be demolished without replacement if they have been vacant for more than 24 months or if “[r]educing the total unit number will allow the PHA to more effectively or efficiently serve assisted households through: 1) reconfiguring apartments (e.g. converting efficiency units to one-bedroom units); or 2) facilitating social service delivery (e.g., converting a basement unit into community space).” *Id.* at 30.

¹²¹ 42 U.S.C. § 1437p(b)(3) (1998) (Section 1347p(b)(3) was stricken by Act of July 27, 1995, Pub. L. No. 104-19, § 1002).

¹²² Shaun Donovan, *Making Public Housing Work for Families*, HUFFINGTON POST (May 26, 2010), http://www.huffingtonpost.com/shaun-donovan/making-public-housing-wor_b_590407.html.

¹²³ The availability of sale to for-profit companies is specifically addressed by PIH Notice 2012-20. Note, however, that private owners are limited in what they use the property for. HUD has specified that the FHA cannot provide multifamily mortgage insurance for projects proposing services that are commercial in nature or “undermine the predominantly residential character of the property.” Revised RAD Guidance July 2, 2013, *supra* note 78, at 8. Although the Low Income Housing Tax Credit Program contains some covenants to preserve low-income housing in the long-term, this program also contains many opportunities for private developers to abandon their initial low-income goals. Low Income Housing Tax Credit Preservation Resource Center, NATIONAL HOUSING LAW PROJECT, <http://nhlp.org/resourcecenter?tid=104> (last visited Dec. 12, 2014).

¹²⁴ Revised RAD Guidance July 2, 2013, *supra* note 78, at 35, 48.

¹²⁵ *Id.*

restraints can have devastating results. This is best exemplified by the history of HOPE VI. Akin to RAD, HOPE VI required little resident input and allowed PHAs to ignore redevelopment opposition by their residents.¹²⁶ Many residents reported that HOPE VI did nothing to improve their living conditions—as most were not invited to return to the renovated developments. Those that were forced to permanently relocate were pressured to move to only neighborhoods they considered just as bad as the ones they left.¹²⁷ Furthermore, HOPE VI private developers utilized the government’s push for mixed-income housing to create developments with less capacity than they previously had, of which fewer units were available to low income tenants. Some of these smaller developments only had 30% of their units open to former public housing tenants, with the rest reserved for higher income or market-rate tenants.¹²⁸ This effectively resulted in millions of government dollars being spent to destroy low-income housing and build gentrified neighborhoods in its place. Many of the critics of HOPE VI have specifically pointed to its lack of checks and balances on private enterprise as its critical flaw.¹²⁹ Capitalist private industry strives to maximize profits. Thus, without safeguards, private landlords will always seek tenants with higher incomes to the detriment of the less fortunate.

While some theorists have posed that private ownership is actually the solution to the country’s housing crisis, this ignores many of the realities of the current public housing system. For example, Jane Jacobs argues that while subsidies are needed to fix the deficits created by the private market, public entities should not control any government-subsidized housing.¹³⁰ Instead, Jacobs praises the “guaranteed-rent method,” which descriptively matches many of HUD’s current project-based programs. She describes how a housing authority would guarantee that builders would get the financing needed for construction and adequate rent after their projects are constructed, in exchange for accepting primarily low-income tenants.¹³¹ Jacobs also describes a system in which “[p]ublic housing is not properly an end in itself,” and thus residents regularly gain wealth over time, eventually buying their units.¹³² The low-income housing utopia that Jacobs describes might have worked

¹²⁶ *When Hope Falls Short: Hope VI, Accountability, and the Privatization of Public Housing*, 116 HARV. L. REV. 1477, 1486–88 (2003) [hereinafter *When Hope Falls Short*].

¹²⁷ *Id.* at 1490 (“HOPE VI does not meaningfully expand the options available to many former residents of HOPE VI developments.”).

¹²⁸ *E.g.*, Kost, *supra* note 76, at 1395–98.

¹²⁹ *See, e.g., id.*; *When Hope Falls Short, supra*, note 126, at 1498 (“In the absence of third-party beneficiaries with standing under HUD contracts, meaningful choice by public housing residents, and opportunities for public input via notice-and-comment procedures, HOPE VI’s public and private partners have been insulated from significant sources of accountability.”).

¹³⁰ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 321–27 (Vintage Books ed., Random House 1992) (1961).

¹³¹ *Id.* at 326–27.

¹³² *Id.* at 336.

when the public housing program was first initiated in 1937, but today many residents are chronically impoverished. This is largely a result of systemic racial injustices and an economy that makes upward economic mobility incredibly difficult for the most poor.¹³³ Jacobs' dream is thus one that would not serve the vast majority of current public housing residents. Under the current public housing system, preserving low-income housing, at least in theory, is the ultimate goal of the government. Nevertheless, unlike the government, private developers seek profits. While it may be possible to develop a housing program that allows profit seeking while preserving truly affordable housing,¹³⁴ RAD is not that program. This is mainly because of the weak provisions of RAD's Use Agreement and the fragility of its HAP contract.

The HAP contract can be removed due to "breach, non-compliance or insufficiency of Appropriations."¹³⁵ Without the HAP contract, the only contract setting income limits to the property is the Use Agreement. The Use Agreement has no income-based rent requirement, instead allowing owners to charge up to 30% of 80% of the area's median income.¹³⁶ Considering that currently 66% of all public housing residents are Extremely Low Income (at or below 30% of the area's median income), this would make former public housing too expensive for two-thirds of its current residents. For many PHAs, their residents' incomes are even more heavily skewed towards the very poor. In Charlottesville, Virginia the average public housing household as of March 2014 made only \$11,342, or roughly 14% of the Charlottesville area's median income of \$82,600.¹³⁷ If Charlottesville's public housing underwent a RAD conversion and subsequently faced foreclosure or other cause for the removal of its HAP contract, tenants with incomes as high as \$66,000 would be eligible to move into apartments formerly reserved for only the poor. When and how often the HAP contract could be removed remains unclear. Regardless, the fact that it could happen and that there is very little guaranteeing the property will stay low income is a huge

¹³³ See *supra* Part I.

¹³⁴ It is worth noting that in many respects the exact line between private and public ownership has been significantly blurred. This has been explored by many academics as well as some court opinions. See *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) (holding that cities can exercise eminent domain to give a private developer another's private property); James S. Burling, *Public Private Partnerships*, in *EMINENT DOMAIN AND LAND VALUE LITIGATION* 563, 565 (ALI-ABA, Course of Study, 2009) ("[T]he lines between what is government action and what is private are less clear today than in the past."); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

¹³⁵ Revised RAD Guidance July 2, 2013, *supra* note 78, at 336.

¹³⁶ Strikingly, this weak restriction is even waivable. See Use Agreement, *supra* note 97, at Sec. 3 (new tenants must have incomes at or below 80% of AMI and rents are restricted at 30% of 80% of AMI; HUD also has sole discretion to reduce the percentage of restricted units due to a lack of low-income demand or financial viability). See also Revised RAD Guidance July 2, 2013, *supra* note 78, at 35–36, 48–49.

¹³⁷ BATTEN RAD POLICY ANALYSIS, *supra* note 2.

weakness to the RAD system. As history has shown, without adequate safeguards, private ownership could jeopardize long-term affordable housing.

VI. SOLUTIONS TO RAD'S WEAKNESSES AND THEIR APPLICABILITY IN CHARLOTTESVILLE

There are two main avenues that a community could take to protect itself from some of the inherent risks of a RAD conversion. First, cooperation and agreements between a PHA, residents, and their municipality could secure commitments that public housing-like affordable units be preserved in the future. Furthermore, certain provisions such as a ground lease or right of first refusal in case of foreclosure could solve many of the inherent ownership issues currently within the RAD system.

Overall, as RAD is such a new program, not much has been written about RAD conversions and their advantages and failures, and the program is too young to see how it will play out in the future. Even so, Anne Marie Smetak recently published an article in which she proposed that RAD could be made a sound program if Congress and HUD were to make a number of changes.¹³⁸ These changes included removing a funding cap under PBV that designates that only half of a development's properties can be converted, with exceptions made only if units are reserved for the elderly or disabled.¹³⁹ She also raises some of the issues addressed here, about risk of foreclosure and inadequate mechanisms for preserving low-income housing units for the future.¹⁴⁰ While the changes that Smetak proposes are sound and would indeed alleviate the problems she describes, there is no guarantee that any of these adjustments will be made. Even if RAD or a successor program does end up making these changes, for some communities where public housing is in dire need of redevelopment, like the one in Charlottesville, Virginia, waiting for these future programs may not be an option. RAD is not the best solution to the country's low-income housing crisis, but right now it is the only one available.¹⁴¹ The following solutions thus focus on steps that communities can make from the ground level to avoid some of the pitfalls of a RAD conversion.

The most obvious but perhaps the most difficult solution to some of RAD's weaknesses is broad-based community involvement and cooperation between a PHA, its residents, and its municipality. Charlottesville has shown how community involvement can resolve some of the issues

¹³⁸ Smetak, *supra* note 61.

¹³⁹ *Id.* at 48–50.

¹⁴⁰ *Id.* at 50–62.

¹⁴¹ Rachel M. Cohen, *The RAD-ical Shifts to Public Housing*, AMERICAN PROSPECT (Aug. 28, 2014), <http://prospect.org/article/can-private-capital-save-public-housing-tenants-have-their-doubts> (“RAD is an emblematic case of this era’s intensified push to use privatization in the pursuit of social goals—not because that approach is necessarily better policy, but because it is politically possible.”).

of RAD. Having an organized and vocal resident organization, like PHAR, and having an engaged and enthusiastic community of public housing residents does much to resolve the resident input and notice problems of a RAD conversion.

The first example of Charlottesville's success is the signing and public declaration of a Residents' Bill of Rights.¹⁴² While this bill of rights is not legally binding, it is politically binding, in that to ignore it would jeopardize any respect and cooperation that CRHA or the city could expect from public housing residents and Charlottesville community members. Among other provisions, the Bill of Rights specifically requires that CRHA and the City provide "a meaningful and enforceable resident participation process . . ." that there be "one-for-one replacement of all affected units . . ." and that "[t]he redevelopment process will support a system of economic justice in which residents have priority access to jobs, homeownership and contracting opportunities . . . [and] the redeveloped communities feature improved amenities and enhanced access to services, employment and transportation for residents."¹⁴³ As redevelopment proceeds, the Bill of Rights acts as a useful list of promises, which residents can demand be fulfilled.

Having an organized community of residents can also help in stalling any RAD conversion until a community is truly prepared. In Charlottesville, CRHA originally planned to apply for a RAD conversion with only the RAD minimum of community meetings, and having asked for no input from residents or PHAR. After CRHA began this process, PHAR reacted swiftly and vociferously.¹⁴⁴ By organizing themselves and issuing a public demand to CRHA that they cease their plans, PHAR was able to stall Charlottesville's application until its implications are understood and the community is prepared.¹⁴⁵ As of July 2015, CRHA has still not applied for a RAD conversion. This delay has allowed for Charlottesville public housing residents to get a much firmer grasp of the RAD process before having to go through it. All throughout 2014, PHAR had several meetings, both publically and internally, educating themselves and the public about RAD, and seeking community input as to resident needs and requests.

In addition to the solutions that increase resident participation in planning, there are also a few solutions to the threat of private ownership. In its most recent notice, HUD made clearer how PHAs could preserve their interest in public housing that would convert through RAD to private ownership.¹⁴⁶ The simplest of these solutions is for a PHA to maintain interest in any RAD converted property through a long-term ground

¹⁴² Residents' Bill of Rights, *supra* note 48.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *RAD Update—Process Slowed for Now?*, PHAR CVILLE (Oct. 11, 2013), <http://www.pharcville.org/2013/10/11/rad-update-process-slowed-for-now/>.

¹⁴⁶ Revised RAD Guidance-2 June 15, 2015, *supra* note 78, at 31.

lease. The RAD program specifically allows this option,¹⁴⁷ and was contemplated in RAD's drafting.¹⁴⁸ Under this system, in a RAD conversion, a PHA would give a private developer a ground lease to its property, rather than sell equity in the property.¹⁴⁹ This would allow the public entity to make demands upon the new private actor and would also provide the PHA an opportunity to regain control of the property were the lease violated or simply at the conclusion of the lease. Ground leases have historically been used extensively in HOPE VI redevelopments.¹⁵⁰ There are also several PHAs currently using ground leases in their RAD applications.¹⁵¹ These PHAs boast that they are implementing additional requirements on developers, in excess of those already in place by the RAD program, thus ensuring long-term preservation of low-income housing.¹⁵²

The use of a ground-lease in any RAD conversion in Charlottesville is especially appealing considering the value of some of CRHA's current developments. Many fear that University of Virginia students in particular would be greatly attracted to the Westhaven development were its income restrictions removed. In addition, Crescent Halls faces similar threat by its location close to the Downtown Mall. A ground lease would ensure that these properties would remain in public control.

CONCLUSION

Subsidized housing has been on a steady trend for over thirty years towards a system that relies on the private market to provide affordable housing. During this steady change, the public housing program has been underfunded. Now its infrastructure requires billions of dollars in upgrades and repairs. RAD offers some solutions to this problem—allowing for the private market to inject a huge amount of money into a public resource. However, RAD lacks resident participation in planning

¹⁴⁷ Revised RAD Guidance July 2, 2013, *supra* note 78, at 35 (“Sufficient interest in the project could include . . . [a] long-term round lease on the land[.]”); Rental Assistance Demonstration Resource Desk, DEP/RENTALHOUS. & URBAN DEV., http://www.radresource.net/faq_release.cfm (answering questions about the possible use of ground leases in a RAD conversion); Revised RAD Guidance-2 June 15, 2015, *supra* note 78, at 31.

¹⁴⁸ Legislative Proposals to Preserve Public Housing, Hearing Before the Subcomm. On Hous. & Cmty. Opportunity of the House Comm. On Fin. Servs, 111th Cong. 4 (2010) (statement of Rep Marchant) (“[O]wning the land, you could do it on a 99-year lease. Owning the land, you don’t give up the kind of ownership, and you really have the control.”).

¹⁴⁹ Use of a ground lease would require a Ground Lease addendum in a PHA’s RAD application. Example of Ground Lease Addendum, U.S. DEP OF HOUS. & URBAN DEV., <http://hud.gov/offices/hsg/mfh/mfhld/017leaseaddendum.pdf>.

¹⁵⁰ See Wayne Hykan, Eric Zinn, *Leases in Affordable Housing Transactions*, 13-WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 185, 186 (2004).

¹⁵¹ *Eg.* Ann Arbor, Mich., Resolution FY13-28 To Approve Ground Lease to River Run LDHA LP, <http://www.a2gov.org/departments/Housing/Documents/Resolution%2013-28%20Ground%20Lease%20to%20River%20Run%20LDHA%20LP.pdf>.

¹⁵² *Id.*

and seemingly permits for public housing to become private housing with inadequate income restrictions. These problems can be substantially alleviated by having an engaged community of residents and using fixes like a ground lease system. Of course, the preferred remedy would be for Congress or HUD to change the RAD program to require complete resident input and better safeguards to maintaining the properties' income restrictions. An even better alternative would be for public housing to simply get the funding it needs from federal appropriations. However, for communities such as Charlottesville that simply cannot afford to wait, RAD, with minor modifications, provides a respectable option for redevelopment.