DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 941

[Docket No. FR–4489–F–02]

RIN 2577–AC05

Public Housing Total Development Cost

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations governing the Total Development Cost (TDC) limit for the development of public housing. The amendments implement statutory changes made to the TDC limit previously established by statute. Among other changes, this final rule limits the amount of public housing capital assistance that a public housing agency may use to pay for housing construction costs. The rule also provides that demolition and environmental hazard remediation costs are subject to the TDC limit only to the extent that such costs are associated with the replacement of public housing units on the project site. Further, the final rule provides that other extraordinary site costs, as determined by HUD, are not subject to the TDC limit. This rule follows publication of a January 4, 2001, proposed rule and takes into consideration the public comments received on the proposed rule.

DATES: Effective Date: January 9, 2003.

FOR FURTHER INFORMATION CONTACT: William C. Thorson, Director, Office of Capital Improvements, Office of Public and Indian Housing, Room 4134, U.S. Department of Housing and Urban Development, 451 Seventh St., SW., Washington, DC 20410; telephone (202) 708–1640, extension 4999 (this is not a toll-free telephone number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

The United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) establishes the statutory framework for HUD's public housing and various other assisted housing programs. The 1937 Act authorizes HUD to assist public housing agencies (PHAs) with the development and operation of public housing projects, and sets forth several requirements regarding public housing development. Two such statutory requirements regarding the development of public housing are found in sections 3(c)(1) and 6(b) of the 1937 Act.

Section 3(c)(1) of the 1937 Act (42 U.S.C. 1437a(c)(1)) defines the terms ''development'' and ''development cost.'' Specifically, section 3(c)(1) defines ''development'' to mean any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-income housing project. The term ''low-income housing project'' includes public housing assisted under the 1937 Act.

(a) Prior to the enactment of the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Public Law 105–276, approved October 21, 1998), section 3(c)(1) defined the term ''development cost'' to mean:

The costs incurred by a [PHA] in such [development] undertakings and their necessary financing (including the payment of carrying charges), and in otherwise carrying out the development of such [low income housing] project.

(b) Following the enactment of section 520(a) of QHWRA, the definition of ''development cost'' was amended to exclude:

The costs associated with the demolition of or remediation of environmental hazards associated with public housing units that will not be replaced on the project site, or other extraordinary site costs as determined by the Secretary.

This final rule amends the Department's public housing development regulations at 24 CFR part 941 to implement section 520(a) of QHWRA. Specifically, HUD has listed the excluded development costs referenced above in a newly defined term called ''Additional Project Costs.'' The rule then provides at § 941.306(b)(3) that Additional Project Costs are not subject to the TDC limit.

(a) Under section 6(b)(1) of the 1937 Act (42 U.S.C. 1437d(b)(1)), loans or other contributions provided under the 1937 Act for the development of public housing may not be used to pay a total ''development cost'' in excess of the amount calculated under section 6(b)(2), unless otherwise authorized by HUD. This amount determined under section 6(b)(2) is referred to as the total development cost (TDC) limit.

(b) Section 520(b) of QHWRA added a new section 6(b)(3) to the 1937 Act, which states that in calculating the TDC limit, HUD:

Shall consider only capital assistance provided by the Secretary to a public housing agency that are [sic] authorized for use in connection with the development of public housing, and shall exclude all other amounts, including amounts provided under [the HOME or CDBG programs.]

HUD has implemented the above amendment by adding a definition of the term ''public housing capital assistance'' to distinguish between those funds that are subject to the TDC limit, and other funding sources. HUD has defined the term ''public housing capital assistance'' to mean assistance provided by HUD under the 1937 Act or the HOPE VI program in connection with the development of public housing under 24 CFR part 941, including Capital Funds provided under section 9(d) of the 1937 Act, public housing development funds under section 5 of the 1937 Act, Operating Fund assistance used for capital purposes under section 9(g)(1) or 9(g)(2) of the 1937 Act, and HOPE VI grant funds.

(c) Section 520(b) of QHWRA added a new section 6(b)(4) to the 1937 Act, which provides that HUD may restrict the amount of capital funds that a PHA may use to pay for housing construction costs, including ''the actual hard costs for the construction of units, builders'' overhead and profit, utilities from the street, and finish landscaping.''

In this final rule, HUD has included definitions of the terms ''Housing Construction Cost'' (HCC) and ''Community Renewal Cost'' (CRC) to clarify the relationship between these two separate subcategories of costs that are subject to the TDC limit. The definitions of HCC and CRC should also clarify the relationship between these costs and Additional Project Costs which, as noted earlier, are not subject to the TDC limit. Substantively, the definitions of Housing Construction Cost and Community Renewal Cost are almost identical to those previously subsumed under the definition of ''Total Development Cost'', as set forth in HUD's January 4, 2001, proposed rule (66 FR 1008).

The Department also has included a definition of the term ''Total Development Cost (TDC) limit'' rather than ''Total Development Cost'' as provided in the proposed rule. The TDC limit is defined to mean the maximum amount of public housing capital assistance that can be used to pay for Housing Construction Costs and Community Renewal Costs in connection with the development of a public housing project, as determined under § 941.306(b)(2). The rule also provides that the TDC limit does not apply to Additional Project Costs. These modifications are intended merely to clarify the Department's existing policies with respect to the TDC limit, rather than to establish new policies.

II. This Final Rule

As previously discussed, HUD published a proposed TDC rule on January 4, 2001 (66 FR 1008), that sought to amend the Department's public housing development regulations at 24 CFR part 941 relating to the calculation of TDC limits, in accordance with section 520 of QHWRA. This final rule implements section 520 of QHWRA after giving due consideration to comments received during the 60-day public comment period.

The preamble of the proposed rule summarized the major amendments that would be made to part 941 by this final rule. The most significant changes made by this final rule to the January 4, 2001, proposed rule are discussed above in Section I of this preamble. The Department has also made the following changes in this final rule:

1. *Revision of the definition of Community Renewal Cost (CRC).* This final rule includes on-site street improvements as a Community Renewal Cost, rather than as a Housing Construction Cost (HCC). It was a mistake in the proposed rule because site improvements are in the community renewal part of the TDC limit.

2. *Revision to HCC applicability.* This final rule provides that acquisition with/without rehabilitation of existing homes is not subject to the HCC, although it is subject to the TDC limit. When a unit is acquired it is completely developed. There is no way to breakdown the HCC from the TDC limit.

3. *Revision to example of extraordinary site costs.* This final rule removes construction of extensive street and other public improvements as an example of extraordinary site costs that are not subject to the TDC limit. These costs are included in the Community Renewal part of the TDC limit under site improvements.

4. *Clarification of HUD notification to changes to cost indices.* This final rule also clarifies that any changes HUD makes to the cost indices as listed in § 941.306 will be announced through a notice published in the **Federal Register**.

5. *Exceptions to TDC.* This final rule clarifies that PHAs are eligible to request a TDC exception for public housing and HOPE VI funds awarded to HOPE VI grantees in FY 1996 and prior years. However, there will be no exceptions granted for the HCC component within the TDC limits. Also, HUD will not grant any exceptions to the TDC limits for public housing and HOPE VI funds awarded in FY 1997 and afterwards.

III. Public Comments Generally

The public comment period for the proposed rule closed on March 5, 2001. HUD received five comments. Three of the commenters expressed concern regarding the proposed changes to the TDC limit and that the changes may affect PHAs' ability to meet the supportive service needs of public housing households. All five commenters offered suggestions to further clarify and strengthen the rule in order to better serve the community. Supportive services are not a development cost that would be covered by the TDC in any case. The 15% cap on community and supportive services for the HOPE VI program is mandated by statute, and does not apply to non-HOPE VI programs, *i.e.*, public housing development.

IV. Discussion of Public Comments Received on the January 4, 2001, Proposed Rule

Comment: (a) The TDC cap should only apply to relocation costs associated with a pro-rata share of the units to be developed on site. (b) The rule should define fair housing-related relocation costs as extraordinary costs, subject to exclusion from the TDC under the definition of ''Total Development Cost'' in the proposed 24 CFR 941.103. The commenter stated that the language of section 3(c)(1) gives considerable discretion to HUD to fashion such a rule. Another commenter stated that such a rule is well within the grant of statutory authority.

HUD Response: Relocation costs are covered under the Community Renewal Cost subcategory. This is not a policy change because relocation costs have always been subject to the TDC limit. However, the statute mandates that HUD use a construction cost guideline based on the average of at least two nationally recognized construction cost indices for publicly bid construction of a good and sound quality. These cost guidelines (which take into account local adjustment factors), are then multiplied by a factor of 1.6 or 1.75 for elevator and non-elevator structures, respectively. The Department believes that these statutory multipliers are adequate to cover relocation costs. Therefore, HUD did not change how relocation costs are treated and these costs remain subject to the TDC limit. HUD also did not change the regulation to include fair housing-related relocation costs as extraordinary site costs and thus exclude them from the TDC limit. Unusual site conditions, such as extensive rock removal, are listed as an Additional Project Cost and, thus, are not subject to the TDC limit.

Comment: (a) Although permitted by statute, HUD has decided to prohibit requests to exceed the TDC limits. HUD is using an arbitrary number, the statutory multipliers, to calculate the Community Renewal Cost. (b) HUD should retain provisions of existing rules that allow exceptions to the TDC limit, and use exception authority to approve a higher TDC limit for extraordinary fair housing-related relocation costs on a case-by-case basis. The commenter stated that HUD must be flexible towards housing authorities that have, for example, extraordinary costs for demolition and site remediation as a result of mandatory conversion, or extraordinary relocation costs. Another commenter suggested to review the current 24 CFR 941.306(a) and retain those provisions that allow exceptions to the TDC limit.

HUD Response: In 1997–1998 HUD had undertaken an intensive process of analysis and consultation with construction industry groups. The participating groups consisted of the National Association of Housing and Redevelopment Officials (NAHRO), Public Housing Authorities Director Association (PHADA), and Council of Large Public Housing Authorities (CLPHA), to establish appropriate cost limits. This TDC limit represents true construction costs and, therefore, does not foresee circumstances under which an exception would be warranted.

The rule does implement section 520 of QHWRA by revising the definition of the TDC limit to exclude the costs of demolition, or of remediation of environmental hazards associated with public housing units that will not be replaced on the project site, or other extraordinary site costs as determined by HUD. For example, if a PHA is demolishing a 300-unit public housing project and putting only 100 new public housing units back on site, only one-third of the costs of demolition and site remediation will be used in calculating whether the development costs of the public housing units are within the TDC limit. Extraordinary site costs, such as removal of extensive underground utility systems, which have been verified by an independent engineer, are not included in the TDC. Also, the rule permits exceptions to be granted by the Secretary for HOPE VI grantees in Fiscal Year 1996 and earlier years. However, exceptions to the HCC limit within the TDC will not be granted.

Comment: HUD should establish mechanisms for vigorous oversight of relocation requirements, including civil rights-related requirements, for all

public housing developments, including HOPE VI and non-HOPE VI development. The commenter wrote that the TDC limit might have important consequences in other contexts related to relocation. The commenter additionally stated that the formula potentially masks the actual costs of relocation, and it may result in a loss of hard units where the actual costs of conversion, including relocation, exceed the cost of keeping the public housing.

HUD Response: The oversight of HUD relocation requirements is not part of this rulemaking. HUD does not believe an adjustment is merited for relocation. As noted, the Department believes that the statutory multipliers are adequate to cover relocation costs and, therefore, relocation costs remain subject to the TDC limit.

Comment: (a) The broad wording of the proposed rule may have the unintended effect of subjecting two (if not more) important sources of supportive services and relocation funds to the TDC limit: grants received by PHAs from the Resident Opportunities and Self Sufficiency (ROSS) program, and Section 8 rental assistance. (b) HUD should amend the definition of ''Total Development Cost'' to state that the TDC does not include community and supportive services. The commenter noted that both programs use funds provided by HUD under the Act. Further, such a result conflicts with previous HUD practice. Additionally, if Section 8 allocations and ROSS grants were subject to the TDC, the community renewal portion of the cap would be rapidly expended, leaving PHAs with few tools to adequately accomplish relocation or provide supportive services. Another commenter stated that examples of such services should include (a) job training activities, (b) day care, (c) transportation, (d) educational activities, (e) case management, (f) Section 8 counseling, (g) after school programs, and (f) health programs.

HUD Response: HUD agrees with the commenter. The TDC limit, as stated in the proposed rule and in this final rule, does not include community and supportive services. The Department has clarified in this final rule that only public housing capital assistance (as defined at § 941.103) is subject to the TDC limit. HOPE VI funds used for community and supportive services are capped at a percentage or amount as stated in the NOFA of the HOPE VI grant. This is the result of statutory requirements in the HOPE VI program and not this TDC rulemaking. Section 8 allocations and ROSS funds are not subject to the TDC limit.

*Comment: Section 6(b) of the U.S. Housing Act states that, ''[i]n calculating the total development cost of a project * * * the Secretary shall consider only capital assistance * * *'' 42 U.S.C. 1437d(b)(3). No funds for capital assistance provided by HUD under the Act or the HOPE VI program should be used to pay development costs in excess of the TDC.* The commenter stated that the proposed rule is far broader, stating that any funds provided under the Act may not be expended in excess of the TDC limit. The commenter stated that this provision should be added as an amendment to 24 CFR 941.306(d). The only sources of financial support specifically exempted from the TDC limit involve funds not provided under the Act: Community Development Block Grants (CDBG), HOME funds, low-income housing tax credits, private donations and private funding. *See*, proposed 24 CFR 941.306(d).

HUD Response: HUD agrees with the commenter that section 6(b)(1) of the 1937 Act extends the TDC limit to capital assistance under the Act provided by HUD in connection with the development of public housing. Accordingly, in this final rule, the Department defines the term ''public housing capital assistance'' to mean assistance provided by HUD under the Act or the HOPE VI program in connection with the development of public housing under this part, including Capital Fund assistance provided under section 9(d) of the 1937 Act, public housing development assistance provided under section 5 of the 1937 Act, Operating Fund assistance used for capital purposes under section 9(g)(1) or 9(g)(2) of the 1937 Act, and HOPE VI grant assistance.

The Department has included all HOPE VI grant funds in the definition of ''public housing capital assistance,'' regardless of whether the funds are authorized and appropriated under the 1937 or under annual appropriations acts. Thus, all HOPE VI funds will be subject to the TDC limit. This position is consistent with HUD's policy that public housing units developed with HOPE VI funds—regardless of whether the funds are authorized and appropriated under the 1937 Act or under annual appropriations acts—must be developed in accordance with the requirements of the 1937 Act.

However, in accordance with section 6(b)(3) of the 1937 Act (as added by section 520(b) of QHWRA), all other funds are excluded from the TDC limit, including funds from CDBG, HOME, low-income tax credits, private donations, and private financing. The Department implements this requirement at § 941.306(b)(4) of this final rule.

Comment: A PHA may use funding sources not subject to the TDC limit to cover project costs that exceed the Housing Construction Cost limit or the TDC limit. A commenter suggested this language as a clarifying revision to the proposed 24 CFR 941.306(d).

HUD Response: HUD agrees with the commenter that a PHA may use funding sources not subject to the TDC limit (such as CDBG funds, HOME funds, low-income tax credits, private donations, and private financing) to cover project costs that exceed the Housing Construction Cost limit or the TDC limit. The rule at § 941.306(b)(4) already states this.

Comment: (a) HUD has not updated the current TDC limits in two years. (b) HUD should update its TDC at least annually based on appropriate cost indexes. The commenter stated that without more frequent updates PHAs are forced to comply with outdated TDC construction indices without the benefit of the previous method of adjusting for inflation by ''trending.'' Another commenter noted that the documents published in the **Federal Register** show figures from 1999 or earlier. The commenter stated that agencies need up-to-date, competitive figures to develop projects with other public or private sectors partners. Another commenter wrote that the Department should also make available by advance notice the construction cost guidelines it will use each year to recalculate the TDC limits.

HUD Response: HUD agrees that the schedule of unit TDC limits should be recalculated annually and it intends to do so based on revisions to the national indices. HUD will issue such updates through PIH notice, or other appropriate means.

In a Senate colloquy before passage of the QHWRA Senator Mack noted that HUD ''should interpret (section 6(b)(2) of the 1937 Act) as requiring the use of indices such as the R.S. Means cost index for construction of ''average'' quality and the Marshall & Swift cost index for construction of ''good'' quality'' (Congressional Record of October 8, 1998, S 11840). The rule specifies that HUD will be using these two indices to calculate the TDC limits. HUD expects to rely on these indices but will notify the public in advance through **Federal Register** notice if it changes the cost indices to other such indices that reflect comparable housing construction quality.

Comment: HUD has not included in its policy a provision for acquisition of

units for public housing, with or without rehabilitation. The commenter asked how HUD would fit these activities into its TDC policy, as proposed.

HUD Response: Acquisition of units of public housing is a development method that is covered under this rule (*see* § 941.102) and, accordingly, is subject to the standard TDC limits set forth in this rule. However, as noted earlier, the Department has decided not to extend the Housing Construction Cost limit to such units, since these units have already been developed at the time of acquisition.

Comment: HUD states it will be able to better understand and control the actual costs of the development if the TDC is divided into the Housing Construction Cost limit (HCC) and the Community Renewal Cost (CRC) limit. The commenter wrote that this suggests that HUD will be performing analysis of construction costs in some manner. The commenter further suggested that these studies be made available to housing agencies and other interested parties to ensure that the TDC policy remains a fair and equitable methodology, and that there is an opportunity for input into HUD's decision making.

HUD Response: HUD believes that it will have better control of the actual costs of development by dividing the TDC into two components, i.e., the HCC and the CRC, and that by doing so housing construction costs can be monitored more closely. There is less chance of inflated construction costs if there is a check to limit the construction costs to the average quality of construction. HUD will be able to detect any cost inflation due to extraordinary structure design or amenities. HUD does not plan to do any analysis at this time but if it decides to do so at a later date the results will be made available to PHAs and other interested parties.

Comment: (a) A workable TDC formula must be comprehensive, realistic, and flexible. The TDC must also be constructed to reflect the real context and environment in which capital construction and development occurs. (b) HUD's rule must incorporate the means to respond to the inherent differences and fluctuations that impact construction and development costs. The commenter wrote that in order to accommodate the wide spectrum of activities covered by the rule, the formula has to account for the full range of cost factors that are intrinsic to such activities, whether carried out by PHAs or private development entities. Another commenter wrote that the fluctuations should be considered given the breadth of the rule in terms of the activities covered and the various construction markets it covers.

HUD Response: The TDC limits are developed in accordance with the statute. The statute mandates that HUD use a construction cost guideline based on the average of at least two nationally recognized residential construction cost indices for publicly bid construction of good and sound quality. Then, this construction cost guideline (which already takes into account local market and other adjustment factors) is multiplied by a factor of 1.6 or 1.75 for elevator and non-elevator structures, respectively, to establish the TDC limit. HUD has established 403 market areas nationwide for purposes of calculating the TDC limits. The use of multiple market areas ensures that local market, environment and other adjustment factors are reflected in the TDC limits for the particular area in which the units are to be constructed.

Comment: The TDC calculation must be formulated in a manner that permits PHAs to be fairly compared to other affordable housing producers. The commenter wrote that this factor has been increasingly important, as the criticism of PHA housing costs have escalated over the past several years.

HUD Response: The TDC limit is required by statute to be based on ''not less than two nationally recognized residential construction cost indices, for publicly bid construction of a good and sound quality''. HUD will use the R. S. Means cost index for construction of ''average'' quality and the Marshall & Swift cost index for construction of ''good'' quality to calculate the construction cost guideline. (HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through **Federal Register** notice.) These indices will permit PHAs to be fairly compared to other affordable housing producers.

Comment: The inclusion of planning costs in TDC is not appropriate. The commenter wrote that generally, owners do not include such predevelopment costs in their development costs pro formas. The commenter further noted that if the intent is to manage the cost of planning activities, which in some cases apparently have become exorbitant, then HUD should address this matter more directly.

HUD Response: The Department disagrees with this comment, since it is inconsistent with the statutory definition of ''development'' in section 3(c)(1) of the 1937 Act, which expressly includes ''* * * all undertakings necessary for planning * * * [the public housing] project.'' In this final rule, such costs are covered as part of the Community Renewal Cost subcategory. Community Renewal Costs represent the difference between the Housing Construction Cost limit and the TDC limit.

Comment: (a) The TDC formula does not take into consideration several significant and essential costs of capital improvement and/or redevelopment projects. (b) Dividing the TDC into ''housing construction costs'' and ''community renewal costs'' would restrict the ability to do development with HUD funding. The commenter wrote that the discussion of the elements included in ''housing construction'' or ''community renewal'' costs include design fees, accounting and legal fees, financing fees, or marketing/lease-up costs. Additionally, absent from the list of costs is the reserve generally required due to the appropriation risk of the public housing operating subsidy. Another commenter wrote that its experience has been that the full TDC has not been adequate to cover all of development costs. If only a fraction of the TDC can be used in the future, then new development may not be possible.

HUD Response: The TDC limit is a statutory cap on the amount of public housing capital assistance (as defined in this rule) that can be spent on identified development costs related to a public housing project. It is not intended to address operating costs, reserves, or other line items relating to the management phase of the project. The one exception to this relates to the funding of initial operating deficits incurred while the project is still in the development phase. These costs are considered to be a development cost and, as a result, are subject to the TDC limit (under the CRC subcategory). However, there is no limit on funds such as CDBG, HOME, low-income tax credits, private donations, and private financing to cover project costs that exceed the housing cost cap or the maximum TDC limit, or to fund costs related to the management phase of the project, *e.g.*, funding of operating reserves.

Comment: The language permitting waivers should not be deleted. The commenter wrote that HUD's failure to acknowledge that waivers may be necessary to accommodate the varying facts and circumstances of PHAs is extremely shortsighted.

HUD Response: HUD disagrees with the commenter. HUD will not grant any exceptions to the TDC limits for public housing and HOPE VI funds awarded in FY 1997 and afterwards. By allowing exceptions or waivers, HUD will not

succeed in its mission of providing affordable housing to the maximum number of low-income families. A PHA can (under the circumstances stated in the rule) use non-public housing sources of funding to cover costs that exceed the TDC limit. Further, a PHA will be eligible to request a TDC exception for Public Housing and HOPE VI funds awarded to HOPE VI grantees in Fiscal Year 1996 and prior years. However, no exceptions to the HCC limits within TDC will be granted.

Comment: In the proposed rule, HUD is decreasing the already-insufficient amount of public housing funding that can be used for construction. The commenter wrote that HUD has arbitrarily divided the TDC amount into ''housing construction costs'' allocation and the ''community renewal'' allocation. The costs for housing construction cannot exceed the average R.S. Means and Marshall & Swift estimated construction costs. The commenter noted that the community renewal allocation could not be used for construction.

HUD Response: HUD disagrees with the commenter that it has arbitrarily divided the TDC limit into a HCC subcategory and a CRC subcategory. On the contrary, the Housing Construction Cost subcategory limit is derived by multiplying the construction cost guideline (which itself is determined by averaging two nationally recognized residential construction cost indices, as required by section 6(b)(2) of the 1937 Act) by the number of public housing units for each bedroom size and structure type in the project and adding the resulting figures.

The TDC limit is established by multiplying the Housing Construction Cost limit by the applicable multiplier (*i.e.*, 1.6 or 1.75 depending on whether the project is an elevator or non-elevator structure), as mandated by the statute. As previously noted, the CRC limit represents the difference between the HCC limit and the TDC limit. Community renewal allocations can be used for the construction of maintenance or management facilities for the project.

Comment: The proposed rule removes what little flexibility was in the TDC process, by revoking HUD's authority to approve costs 5–10% above the TDC. The commenter noted that under the old regulations HUD allowed trending to adjust the TDC construction indices to compensate for inflation and allowed the TDCs to be exceeded by 5% at the field office level or exceed by up to 10% at the Secretary's level. The commenter further noted that flexibility is needed to adjust TDCs for inflation between the time of TDC publication and the initial fund reservation and the actual start of construction, and to compensate for unforeseen and unavoidable extra costs.

HUD Response: HUD intends to transmit an updated schedule of unit TDC limits every year, thus there is no need for trending adjustments. A PHA is required to use the TDC limits in effect at the time of closing.

Comment: The proposed rule does not clearly address and may prevent future development through direct acquisition of existing homes. One commenter wrote that the ''housing construction costs'' allocation of the TDC is too low to allow the purchase of existing homes in the Twin Cities housing market. The commenter noted further that even the full TDC is very hard to work with in this market.

HUD Response: HUD agrees with the commenter that the HCC subcategory of the TDC limit should not be applicable to the acquisition of existing homes because items included in the sale of an existing home, like cost of land and other development costs, are included in the CRC subcategory limit. Therefore, HUD has amended the final rule at § 941.306(c)(3) to state that for acquisition with or without rehabilitation of existing homes, only the overall TDC is applicable and not the HCC cost limit.

Comment: The proposed rule would further concentrate low-income housing in impacted areas. The commenter wrote that the low funding levels provided by these TDC regulations would mean that the only vacant sites and existing homes that will be affordable for development would be in lower income census tracts.

HUD Response: HUD disagrees. Based on the Department's experience with the HOPE VI program and other public housing development activity, units have been constructed in mixed-income communities since it first revised the TDC policy in 1999 through a HUD Notice.

Comment: The Housing Construction Cost (HCC) subcategory of the TDC limit includes finish landscaping (trees, grass, fencing, walkways, etc.) in the per-unit cost equation; conversely, the two indices used to derive the HCC (RS Means and Marshall & Swift) exclude finish landscaping from the per unit cost equation. The commenter wrote that there should be categorizations of costs associated with finish landscaping as a Community Renewal Cost.

HUD Response: HUD disagrees with the commenter because national construction cost indices include landscaping around the structure. Additional landscaping is included under the Community Renewal Cost subcategory of the TDC limit.

Comment: The HCC subcategory of the TDC limit includes utilities from the street in the per-unit cost equation; conversely, the two indices used to derive the HCC (RS Means and Marshall & Swift) exclude utility tap fees from the per unit cost equation. The commenter wrote that there should be categorizations of the utility tap fees as a Community Renewal Cost or an extraordinary site cost.

HUD Response: HUD disagrees with the commenter because the Community Renewal Cost subcategory of the TDC limit includes the cost of bringing the utilities from the street to the site, which covers utility tap fees. Therefore, no separate categorization of this item is necessary.

Comment: The two indices used to derive the HCC (RS Means and Marshall & Swift) exclude the cost of on-site streets, driveways, and garages from the per-unit cost equation, yet many local jurisdictions require the provision of off-street parking. The commenter wrote that there should be categorization of any costs associated with the provision of jurisdictional mandated off-street parking as a Community Renewal Cost.

HUD Response: The Community Renewal Cost subcategory of the TDC limit includes site improvements that cover site streets, driveways, curb and gutters, off-street parking and landscaping. Therefore, there is no need for separate categorization of these items as suggested by the commenter.

Comment: The two indices used to derive the HCC (RS Means and Marshall & Swift) exclude any allowances for the extra cost associated with Americans with Disabilities Act (ADA) accessible and ADA adaptable units. The commenter suggested establishing an allowance for the added cost associated with ADA accessible and ADA adaptable units.

HUD Response: Generally, only five percent of public housing units must meet accessibility and adaptable unit standards. Costs to meet these requirements generally fall within the TDC limit. For this reason, the Department has not modified the rule in response to this comment.

Comment: The two indices used to derive the HCC (RS Means and Marshall & Swift) exclude any allowances for energy efficient windows, insulating building materials, and energy efficient mechanical systems. Additionally, the Marshall and Swift moderate climate energy package includes a ''weighting of single and double glazing.'' The use of single glazing and less efficient mechanical systems is in direct

opposition to Energy Conservation Measures outlined in 24 CFR 965.301. The commenter suggested including an allowance of between 5–10% of the HCC for the installation of energy efficient glazing, insulating building materials, and high-efficiency mechanical systems.

HUD Response: HUD disagrees with the commenter because the national construction cost indices consider the National Building Codes, Fire and Safety codes, and Energy Codes in their construction cost determination. For this reason, the Department has not modified the rule in response to this comment.

V. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) at the proposed rule stage. That Finding remains applicable and is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Federalism Impact

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule would not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) (the RFA), has reviewed and approved this final rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The reasons for HUD's determination are as follows:

(1) *A Substantial Number of Small Entities Will Not be Affected.* The final rule is exclusively concerned with public housing agencies that receive capital assistance provided by HUD for the development of public housing. The final rule would update HUD's public housing development regulations at 24 CFR part 941 to incorporate the statutory amendments made by section 520 of the QHWRA. Under the definition of ''small governmental jurisdiction'' in section 601(5) of the RFA, the provisions of the RFA are applicable only to those few public housing agencies that are part of a political jurisdiction with a population of fewer than 50,000 persons. The number of entities potentially affected by this rule is therefore not substantial.

(2) *No Significant Economic Impact.* The final regulatory amendments will not change the amount of capital funding available to public housing agencies for the development of public housing. Accordingly, the economic impact of this rule will not be significant, and it will not affect a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of Unfunded Mandates Reform Act of 1995.

List of Subjects in 24 CFR Part 941

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR part 941 as follows:

PART 941—PUBLIC HOUSING DEVELOPMENT

1. The authority citation for 24 CFR part 941 continues to read as follows:

Authority: 42 U.S.C. 1437b, 1437c, 1437g, and 3535(d).

2. Revise § 941.102(b)(3) to read as follows:

§ 941.102 Development methods and funding.

* * * * *

(b) * * *

(3) Funds available to it from any other source, consistent with § 941.306(e), or as may be otherwise approved by HUD.

* * * * *

3. In § 941.103, add, in alphabetical order, definitions of the terms *''Additional Project Costs (APC)'', ''Community Renewal Cost (CRC)'', ''Housing Construction Cost (HCC)'',* and *''Public housing capital assistance''* and revise the definition of *''Total development cost (TDC)''* to read as follows:

§ 941.103 Definitions.

* * * * *

Additional Project Costs (APC) means the sum of the following HUD-approved costs related to the development of a public housing project, which costs are not subject to the Total Development Cost limit but are included in the maximum project cost, as described in § 941.306:

(1) Demolition of, or remediation of environmental hazards associated with, public housing units that will not be replaced on the site; and

(2) Extraordinary site costs that have been verified by an independent registered engineer (*e.g.*, removal of underground utility systems, and replacement of off-site underground utility systems, extensive rock and/or soil removal and replacement, and amelioration of unusual site conditions such as unusual slopes, terraces, water catchments, lakes, etc.)

* * * * *

Community Renewal Cost (CRC) means the sum of the following HUD-approved costs related to the development of a public housing project: planning (including proposal preparation), administration, site acquisition, relocation, demolition of, and site remediation of environmental hazards associated with, public housing units that will be replaced on the project site, interest and carrying charges, off-site facilities, community buildings and non-dwelling facilities, contingency allowance, insurance premiums, any

initial operating deficit, on-site streets, on-site utilities, and other costs necessary to develop the project that are not covered under APC or Housing Construction Cost.

* * * * *

Housing Construction Cost (HCC) means the sum of the following HUD-approved costs related to the development of a public housing project: dwelling unit hard costs (including construction and equipment); builder's overhead and profit; the cost of extending utilities from the street to the public housing project; finish landscaping; and the payment of Davis-Bacon wage rates.

* * * * *

Public housing capital assistance means assistance provided by HUD under the Act or the HOPE VI program in connection with the development of public housing under this part, including: Capital Fund assistance provided under section 9(d) of the Act, public housing development assistance provided under section 5 of the Act, Operating Fund assistance used for capital purposes under section 9(g)(1) or (g)(2) of the Act, and HOPE VI grant assistance.

* * * * *

Total Development Cost (TDC) limit. The maximum amount of public housing capital assistance that can be used to pay for Housing Construction Costs and Community Renewal Costs in connection with the development of a public housing project, as determined under § 941.306(b)(2). The TDC limit does not apply to Additional Project Costs.

4. Revise § 941.306 to read as follows:

§ 941.306 Maximum project cost.

(a) *Calculation of maximum project cost.* The maximum project cost represents the total amount of public housing capital assistance used in connection with the development of a public housing project, and includes: (1) project costs that are subject to the TDC limit (*i.e.*, Housing Construction Costs and Community Renewal Costs); and (2) project costs that are not subject to the TDC limit (*i.e.*, Additional Project Costs). The total project cost to be funded with public housing capital assistance, as set forth in the proposal and as approved by HUD, becomes the maximum project cost stated in the ACC. Upon completion of the project, the actual project cost is determined based upon the amount of public housing capital assistance expended for the project, and this becomes the maximum project cost for purposes of the ACC.

(b) *TDC limit.* (1) Public housing capital assistance may not be used to pay for Housing Construction Costs and Community Renewal Costs in excess of the TDC limit, as determined under paragraph (b)(2) of this section. However, HOPE VI grantees will be eligible to request a TDC exception for public housing and HOPE VI funds awarded in Fiscal Year 1996 and prior years. No exceptions to HCC limits will be granted within the TDC limit.

(2) *Determination of TDC limit.* HUD will determine the TDC for a public housing project as follows:

(i) *Step 1: Unit construction cost guideline.* HUD will first determine the applicable ''construction cost guideline'' averaging the current construction costs as listed in two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of ''average'' quality and the Marshal & Swift cost index for construction of ''good'' quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**.

(ii) *Step 2: Bedroom size and structure types.* The construction cost guideline is then multiplied by the number of units for each bedroom size and structure type.

(iii) *Step 3: Elevator and non-elevator type structures.* HUD will then multiply the resulting amounts from step 2 by 1.6 for elevator type structures and by 1.75 for non-elevator type structures.

(iv) *Step 4: TDC limit.* The TDC limit for a project is calculated by adding the resulting amounts from step 3 for all the public housing units in the project.

(3) *Costs not subject to the TDC limit.* Additional Project Costs are not subject to the TDC limit described in paragraph (b)(2) of this section.

(4) *Funds not subject to the TDC limit.* A PHA may use funding sources not subject to the TDC limit (*e.g.*, CDBG funds, HOME funds, low-income tax credits, private donations, private financing, etc.) to cover project costs that exceed the TDC limit or the Housing Construction Cost limit described in paragraph (c) of this section. Such funds, however, may not be used for items that would result in substantially increased operating, maintenance or replacement costs, and must meet the requirements of section 102 of the HUD Reform Act (42 U.S.C. 3545). These funds must be included in the project development cost budget and legally acceptable written commitments for such funds must be provided by the PHA for HUD approval.

(c) *Housing Construction Costs.* (1) *General.* A PHA may not use public housing capital assistance to pay for Housing Construction Costs in excess of the amount determined under paragraph (c)(2) of this section.

(2) *Determination of Housing Construction Cost limit.* HUD will determine the Housing Construction Cost limit as listed in at least two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of ''average'' quality and the Marshal & Swift cost index for construction of ''good'' quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**. The resulting construction cost guideline is then multiplied by the number of public housing units in the project based upon bedroom size and structure type. The Housing Construction Cost limit for a project is calculated by adding the resulting amounts for all public housing units in the project.

(3) The Housing Construction Cost limit is not applicable to the acquisition of existing housing, whether or not such housing will be rehabilitated. The Total Development Cost limit is applicable to such acquisition.

(d) *Community Renewal Costs.* Public housing capital assistance may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the Housing Construction Costs paid for with public housing capital assistance and the TDC limit.

(e) *Rehabilitation of existing public housing projects.* The HCC limit is not applicable and the TDC limit for modernization of existing public housing is 90% of the TDC limit as determined under § 941.306(b)(2). This limitation does not apply to the rehabilitation of any property acquired pursuant to § 941.102.

Dated: December 3, 2002.

Michael M. Liu,

Assistant Secretary for Public and Indian Housing.

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