

HUD response. HUD agrees that a rule change is required to prevent the intentional creation of vacancies. In response to these public comments, the final rule provides that vacant units will not be considered in the determination of distress if HUD determines, in its sole discretion, that the vacancies were created intentionally and do not indicate continued distress.

2. Comments Regarding the Long-term Viability Test

Comment: Requiring that PHAs meet all four long-term viability factors contradicts statute. Under the proposed rule, a PHA must meet four regulatory factors in order for a development to satisfy the long-term viability test. Specifically, the development, after reasonable investment for at least 20 years, must: (1) Be able to sustain structural/system soundness and full occupancy; (2) not be excessively densely configured relative to other similar (typically family) housing in the community; (3) be able to achieve a broader range of family income; and (4) have no other site impairments that clearly should disqualify the site from continuation as public housing. Two commenters wrote that this requirement is in direct conflict with section 33(a)(3)(A) of the 1937 Act. According to the commenters, the statute only requires that a development meet one of three statutory factors. The commenters urged that the final rule provide that a PHA may satisfy the long-term viability test if it meets any one of the regulatory factors.

HUD response. HUD does not agree with these commenters. The regulatory language is nearly identical to the statutory language of section 33(a)(3)(A). The regulatory provisions opposed by the commenters merely interpret and clarify this statutory language. The final rule continues to provide, as authorized by the statutory language of section 33, that a PHA must meet all the regulatory factors to satisfy the long-term viability test. Each of the factors measures a different and important aspect of a development's viability. Relying on only one of the factors, as the commenters suggest, would ignore the other elements necessary for an accurate assessment of a development's long-term integrity as public housing. Further, HUD believes that the factors are sufficiently flexible to address the concerns raised by the commenters regarding the strictness of the long-term viability test.

Comment: Density standard exceeds statutory language. The proposed rule provided that a development satisfies the long-term viability test if it is not

“excessively densely configured relative to standards for similar (typically family) housing in the community.” One commenter wrote that the proposed standard exceeded the standard established under section 33(a)(3)(A) of the 1937 Act. The statute provides that the long-term viability test may be satisfied by “density reduction.” The commenter wrote that the “statute does not authorize a test that compares the relative densities of the development and the surrounding neighborhood, but merely requires the current density of the development to be reduced.”

HUD response. The use of relative density levels is consistent with the recommendations made by the Commission. The density reduction efforts of a PHA cannot be accurately evaluated without considering the density of comparable housing. For example, housing density varies among communities due to differences in local conditions, such as population, geography, and location of employment. Accordingly, this final rule continues to require that the density of a development be measured against the density of other similarly situated housing.

Comment: Income mix standard exceeds statutory standard. The proposed rule provided that a development satisfies the long-term viability test if it “will not constitute an excessive concentration of very low-income families.” Two commenters wrote that the proposed standard exceeded the statutory standard set forth in section 33(a)(3)(A) of the 1937 Act. The statute provides that the long-term viability test may be satisfied by “the achievement of a broader range of family income.” One of the commenters wrote that the “distinction is critical because a PHA can meaningfully broaden the income range and still have a resident population that is primarily very low-income.” The second commenter wrote that “[g]iven that the analysis must project over a 20-year period, it is mere speculation to maintain that the site will be a candidate for additional mixing.”

HUD response. In response to these public comments HUD has revised the income-mix component of the long-term viability test to more closely track the statutory language of section 33. Specifically, the final rule provides that a development satisfies the income-mix requirements if, after reasonable investment for the specified period of time, it is probable that the development “can achieve a broader range of family income.”

Comment: “More expensive” criterion should be removed. A development

must be converted if it would be more expensive to modernize and operate the development for its remaining useful life than to provide tenant-based assistance to all residents. One commenter objected to this criterion for conversion. The commenter wrote that section 33 cites only to “reasonable modernization expenses.” “There is nothing in the statute that suggests a development must be cheaper than Section 8 assistance in order to be viable in the long term.”

HUD response. The regulatory language closely tracks the statutory language of section 33. Specifically, section 33(a)(3) provides that a development is subject to required conversion if the development is identified as distressed housing by the PHA, in accordance with HUD guidelines, and either: (1) The PHA cannot assure long-term viability; or (2) the development has an estimated cost (during its remaining useful life) of continued operation and modernization as public housing that exceeds the estimated cost (during its remaining useful life) of providing voucher tenant-based assistance for all families in occupancy based on appropriate indicators of cost (such as the percentage of total development costs required for modernization). Accordingly, HUD has not revised the proposed rule to adopt the suggestions made by the commenter.

3. Comments Regarding Issues for Which HUD Specifically Invited Public Comment

Although HUD invited public comments on all aspects of the June 23, 1999, proposed rule, the preamble to the proposed rule specifically solicited comments on two issues related to the standards for identifying developments subject to required conversion. HUD solicited comments on:

1. Whether the definition of “distressed housing” should include developments with less than 250 units or that are not primarily occupied by families; and

2. Whether a comparison of the average median income at a development with the average median income in the development's area, or other measure of tenant income, should be included in the identification of developments as distressed.

Comment: Final rule should not require conversion for developments with less than 250 units or that are not primarily occupied by families. Four commenters made this recommendation. According to one of the commenters, including developments with less than 250 units,