

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2017

Narrowly-Tailored Privatization

Brandon Weiss

American University Faculty Account, weiss@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Housing Law Commons](#), [Law and Economics Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Brandon Weiss, *Narrowly-Tailored Privatization*, 26 Journal of Affordable Housing and Community Development Law 79 (2017).

Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/2150

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

Narrowly-Tailored Privatization

Brandon M. Weiss

Affordable housing projects in the United States have served as an integral part, and often the backbone, of broader community economic development (CED) initiatives for as long as community development corporations (CDCs) have existed. As the field of CED evolves, and critical thinking about the role of law and lawyers within it continues to develop, it is important that this thinking include a rigorous reevaluation of how affordable housing strategies can best support the broader aims of CED. Evidence from eighty years of significant federal policy intervention in affordable housing, fifty years of experimentation by CDCs, and thirty years of modern Low-Income Housing Tax Credit (LIHTC) financing teaches at least one lesson that will be particularly relevant to CED initiatives in the decades to come: privatization is a tool best used as a scalpel rather than a bludgeon. An example will help flesh out this principle.

In San Francisco, attorneys at the National Housing Law Project (NHLP) have for the last several years engaged in a multi-year advocacy and community education effort around the U.S. Department of Housing & Urban Development's (HUD's) plans to revitalize the nation's subsidized housing stock. By HUD's estimates, public housing in the United States suffers from a \$26 billion capital needs backlog.¹ Leaky roofs, dilapidated elevators, and old plumbing and heating systems threaten the health and safety of residents. HUD's proposed FY2011 budget included a line item for a new program to address this problem: the Transformation of Rental Assistance Program² or, as it colloquially (and regrettably) came to be known, TRAP. Over the ensuing years, the program evolved—first to Preservation, Enhancement, and Transformation of Rental Assistance (PETRA), and then to the Rental Assistance Demonstration (RAD)—but the primary goal remained the same: to leverage private financing to recapitalize and rehabilitate the stock of federal subsidized housing.

RAD authorizes public housing authorities (PHAs) to convert public housing operating and capital funding streams into Project-Based Section 8

1. U.S. DEP'T OF HOUS. & URBAN DEV., CAPITAL NEEDS IN THE PUBLIC HOUSING PROGRAM 23, 41 (2010) (estimating that this figure will increase to \$89 billion over the next twenty years).

2. See U.S. DEP'T OF HOUS. & URBAN DEV., PROMOTING BETTER LOCATIONAL OUTCOMES FOR HOUSEHOLDS RECEIVING RENTAL ASSISTANCE THROUGH TRA FY2011 FUNDING (2010), https://portal.hud.gov/hudportal/documents/huddoc?id=TRA_FY11_50MPublicFinal.pdf.

assistance³ and, in doing so, allows a given public housing project to enter into the mainstream of modern affordable housing finance. Banks are comfortable lending against the promise of future Section 8 income. The conversion process enables layering LIHTC financing on top of Section 8 rental assistance, paving the way for the infusion of millions of dollars of rehabilitation funds into an aging project.

In order to facilitate access to this financing, however, the RAD conversion process allows for the transfer of public housing ownership from PHAs to private single-asset entities.⁴ This feature of the program raises a number of potential concerns: Will the substantive rights of tenants be affected? Will current tenants be displaced? And, perhaps most alarming from a long-term perspective, what happens if affordability restrictions expire or are terminated, and our public housing stock is now held in private hands?

Recognizing these risks, NHLP began a sustained effort of community engagement with subsidized housing residents and advocacy with HUD—in part, as facilitator of the national Housing Justice Network (HJN). Lawyers involved in HJN submitted letters, commented on and suggested draft programmatic language, and organized meetings between senior HUD officials and residents to voice these concerns.

HUD's final implementation of the program incorporated a response to the issue of long-term public housing control. While PHAs could transfer projects to private entities in order to access LIHTC financing, they could only do so in certain enumerated circumstances, such as where the PHA (or PHA-controlled entity) serves as the sole general partner or managing member of the tax credit entity, or where the PHA retains fee ownership of the project and leases the land to the tax credit entity pursuant to a long-term ground lease.⁵ The program, however, did not go as far as many would have hoped—for example, a catchall provision allows for transfers to private entities by “other means that HUD finds acceptable, in its sole discretion.”⁶

As the program is still in its infancy, we are learning precisely how the conversion process will be structured by PHAs around the country. But the development of RAD already serves as a revealing case study. The history of the federal government's attempts to infuse private market incentives into affordable housing policy has been a story of mismatch—failing to appropriately calibrate that which is being leveraged from the private market with the incentives that are necessary and sufficient to offer in exchange. As a result, the government has often given away too much: the

3. See U.S. DEP'T OF HOUS. & URBAN DEV., PIH No. 2012-32 (HA), REV-2, RENTAL ASSISTANCE DEMONSTRATION—FINAL IMPLEMENTATION (2015).

4. *Id.* at 30–31.

5. *Id.* at 31.

6. *Id.*

assisted housing programs of the 1950s–1980s resulting in massive back-end profits to private owners far out of proportion to their value added; the LIHTC program setting the stage for similarly unnecessary windfall profits starting in 2020 when thirty-year rent restrictions start to expire; and now, in the RAD context, PHAs potentially giving away fee title to our public housing when recapitalization is possible without doing so.

In the case of RAD, NHLP recognized that it is possible to bifurcate the goal of leveraging private capital from the mechanism of transferring control of public housing assets to private interests. Hopefully, thanks to the dedicated lawyering of NHLP and HJN, the limiting language referenced above will create a more nuanced program—one that leverages private capital while not paying the excessive price of sacrificing long-term control.

Most formulations of the aims of CED as a field include the value of preserving and expanding access to material and social resources in underserved communities as well as prioritizing local control and accountability with respect to those resources. As we think about the future of CED, and the respective role that law and lawyering will play, advocacy for a more narrowly-tailored approach to the infusion of market mechanisms into our affordable housing strategies will be critical to achieving the broader goals of the field.

