Commonwealth of Massachusetts
DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT
Maura T. Healey, Governor ◆ Kimberley Driscoll, Lieutenant Governor ◆ Jennifer D. Maddox, Undersecretary

Public Housing Notice 2023-04

To: Local Housing Authority Executive Directors

From: Ben Stone, Director, Division of Public Housing

Subject: New Public Housing Redevelopment and Land Disposition Powers

Date: March 30, 2023

Background and Summary

On November 10th, 2022, Governor Baker signed H.5374, "An act relating to economic growth and relief for the Commonwealth," into law as Chapter 268 of the Acts of 2022 ("Chapter 268"). Among many other provisions and funding appropriations related to economic development, this law contains various reforms to public housing procurement, contracting, and real property disposition that DHCD believes will make the redevelopment process easier for public housing and further encourage Local Housing Authorities (LHAs) to leverage their vacant or underutilized land for housing production. This PHN highlights several key points for the attention of LHAs and is not a complete summary of this law.

Key Reforms:

A. LHAs may retain proceeds from disposition of vacant land
B. New flexibility for disposition of dilapidated c. 705 units
C. Clarification of DHCD oversight requirement for LHAs without state-aided units
D. Procurement relief from c. 149 for mixed-finance projects

Disposition of vacant land (Section 128 of Chapter 268)

Amended Legislation

Before Chapter 268, MGL c. 121B Section 34 ("Section 34") required LHAs to return proceeds from most[1] property dispositions to its municipal government and to the Commonwealth General Fund, if the

[1] As explained in "Disposition of public housing units" section of this PHN, the proceeds from dispositions conducted under MGL c. 121B Section 26(p) are handled differently.

property was originally acquired with state funding.[2] Chapter 268 amends Section 34 to allow LHAs that continue to operate state-aided public housing after a disposition to retain such proceeds for capital projects at its other state-aided developments:

121B Section	Old law	New law
34	Proceeds go to combination of City/Town and Commonwealth General Fund	After paying off bonds and other obligations, LHA retains the remaining proceeds "for the preservation, modernization, and maintenance" of its other state-aided developments "as approved by the department"[3]

Discussion

"Disposition" may take multiple forms. Beyond selling the land outright, LHAs may also consider leasing the land, thereby retaining ownership in the long term while still generating revenue in the short term. Because an LHA's retention of ownership could potentially cause development on the land to be subject to MGL c. 149 public construction requirements, including prevailing wage, DHCD encourages LHAs to consult with the Department before developing a Request for Proposals.

Please note that DHCD must make a regulatory finding that the land is surplus to the needs of existing or future state-aided housing developments (cf. 760 CMR 4.12) before an LHA may dispose of it. LHAs should reach out to DHCD during the planning phase of any disposition. Pursuant to chapter 268, DHCD also must approve the LHA's plans for use of the disposition proceeds, which approval may take the form of an approved Capital Improvement Plan including those funds or approval through other oversight of an LHA's capital projects. Use of such proceeds will remain subject to all the usual DHCD review and approvals for state-aided capital projects.

LHAs considering disposing their vacant/underutilized land for development may also contact Mass Housing Partnership for technical assistance for pre-development and pre-disposition activities. See PHN 2019-13 for more details.

Impact on Operating Subsidy

Proceeds from disposition would be reported on LHA operating statements under Account 3920, "Gain/Loss from Sale/Disposition of Property." This account is **not** counted in the total LHA Revenue calculated on Line 1 of the ANUEL and Subsidy Worksheet; in other words, disposition proceeds will **not** have any effect on the amount of operating subsidy (or formula capital funding) received by an LHA.

[2] The statute concerning disposition proceeds applies equally to housing developments as to vacant land, but in this section it is discussed in terms of vacant land due to the narrowness of circumstances in which an LHA would be allowed to dispose of a housing development under MGL c. 121B Section 26(k).

[3] In the event an LHA no longer has state-aided public housing following disposition, the remaining proceeds "shall be paid to the department to fund capital improvements for the preservation, modernization and maintenance of state-aided public housing".

Disposition of public housing units (Section 125 of Chapter 268)

Amended Legislation

DHCD statute, regulation, and policy generally forbid disposition of state-aided public housing units without replacing them 1:1. Per the language in MGL c. 121B Section 26(k) as newly amended by Chapter 268, the specific standard for disposal of units **without** 1:1 replacement is a finding by DHCD that "a shortage of low-rent housing no longer exists in the applicable city or town"; given the statewide housing shortage, DHCD anticipates making such a finding only in rare circumstances.

MGL c. 121B Section 26(p) ("26(p)") has long provided an exception to the general rule, allowing disposition without replacement of deteriorated or obsolete c. 705 and c. 167/689 units if certain requirements are met. In summarized form, these requirements are as follows:

1. It is not feasible to maintain the units at or bring them up to a decent standard of habitability
2. The inventory of available housing units in the surrounding community is not substantially diminished as a result of the disposal
3. For c. 167/689 units, the Department of Developmental Services or Department of Mental Health (as applicable) consents to the disposition
4. For c. 705 units, the units have been vacant for a prescribed amount of time

Chapter 268 changes that prescribed time to allow for more flexibility in managing long-term vacant c.705 units.

121B Section	Old law	New law
26(p), line 254 (regarding c. 705 units)	Must have been vacant as of November 1, 2012	Must have been vacant for past two years for reasons DHCD has determined "not to be the fault of the housing authority"

Under the old standard, a c. 705 unit that was still occupied as of November 1, 2012 would never become eligible for disposition without replacement, regardless of what occurred with the unit since that date. Under the new standard, housing authorities have the flexibility to dispose of obsolete c. 705 units if, after two years, DHCD makes a finding that the units cannot feasibly/economically be brought back online.

Preference for Rehabilitation

Please note that DHCD must approve the disposition and make the finding that the two-year vacancy is "not...the fault of the housing authority." DHCD's preference in all cases is that vacant units be brought back online if it is feasible to do so. To this end, DHCD reminds LHAs that they are invited to request up to $65,000/unit in special funding for vacant unit rehabilitation that their reserves and formula funding cannot cover (cf. PHN 2016-34).

Proceeds from 26(p) Dispositions

26(p) provides an entirely **separate** disposition process from the general one described in Sections 34 and 26(k). To that point, be aware that proceeds from a disposition conducted under 26(p) are not retained by the LHA: they are remitted to an expendable trust controlled by DHCD. However, DHCD's general practice is to reserve these proceeds for reallocation to the same LHA for use on capital improvements at other state-aided developments that serve households that would have been eligible for occupancy of the units that had been sited on the property.

LHAs with No Remaining State-Aided Units (Section 127 of Chapter 268)

Chapter 268 explicitly clarifies, by amendment to Section 29 of MGL c. 121B, that if a housing authority no longer owns, leases, or manages any units eligible to receive ongoing public housing capital or operating assistance from DHCD, then the housing authority is not subject to DHCD oversight or reporting requirements. Such a housing authority will no longer need to submit Executive Director contracts for review and approval, or participate in Performance Management Review (PMR), Agreed Upon Procedures (AUP), Annual Plan, or Regional Capital Assistance Team (RCAT) programs, notwithstanding language in state-aided public housing regulations stating that "each LHA" is subject to those requirements. This largely codifies current practice.

Procurement Relief for Public Housing Redevelopment (Section 130 of Chapter 268)

Amended Legislation

Chapter 268 adds a new paragraph to MGL c. 121B Sec. 34 which relieves public housing redevelopment projects involving conveyance to an affiliated non-profit or a private entity from most requirements of public construction procurement contained in MGL c. 149. Prevailing Wage and contractor bonding requirements under MGL c. 149 Secs. 26 to 27F, inclusive, and Sec. 29 will still apply. The new law also requires DHCD review and approval of the procurement process used to undertake the redevelopment. In full, the new paragraph reads as follows:

> Notwithstanding any general or special law to the contrary, construction and development activity related to redevelopment of state-aided or federally-aided public housing projects where the land, buildings or structures associated with the housing project have been conveyed or transferred to an affiliated non-profit or private entity for purposes of completing the redevelopment shall not be subject to any general or special law related to the procurement and award of contracts for the planning, design, construction management, construction, reconstruction, installation, demolition, maintenance or repair of buildings by a public agency; provided, however, that the department shall review and approve the procurement processes used to undertake this redevelopment in accordance with subsection (q) of section 26; and provided further, that all construction, reconstruction, alteration, installation, demolition, maintenance or repair shall be subject to sections 26 to 27F, inclusive, and section 29 of chapter 149. The department shall request rates and updates from the division of labor standards for these projects.

In summary:

121B Section	Old law	New law
34	No special exemptions; redevelopment projects are subject to all public contracting laws (unless special Home Rule legislation obtained)	Redevelopment projects involving transfer to an affiliated non-profit or private entity are exempted from most public contracting laws (except prevailing wage and contractor bonding)

Discussion

The new law gives housing authorities and their partners much more flexibility in procuring and managing major redevelopment projects. DHCD encourages LHAs to consider such projects as a method to preserve and modernize their portfolio of affordable housing units. State law allows such projects to include market-rate units (cf. MGL c. 121B Sec. 26(k)(2)), the rents from which may be able to significantly subsidize redevelopment of the affordable units. For example, in a mixed-finance redevelopment project in Chelsea that closed in FY 2022, the market-rate portion of the project effectively paid for 30% of the redevelopment cost of the public housing units.

Questions and Answers

DHCD recognizes that LHAs may have questions regarding implementation of the new legislation. Please find several Q&As below and contact Edward Chien, Real Estate and Redevelopment Specialist, at edward.chien@mass.gov for any other clarification:

1. *When are the Chapter 268 procurement exemptions effective?*

Chapter 268 was effective immediately (November 10, 2022) for projects meeting the specified criteria.

2. *Since Chapter 268's exemptions apply only to projects where the land, buildings or structures "have been conveyed" to a private entity, do these redevelopment projects need to adhere to c. 149 procurement in the early stages, before the conveyance actually takes place? Or is the entire project exempted by virtue of the pending conveyance?*

DHCD recommends that LHAs take one of two actions at the outset of a qualifying redevelopment project to ensure its exemption under Chapter 268:

1. **Execute a "bridge conveyance" to an affiliated entity, which would then conduct procurement for the project**. Such conveyance could be as simple as writing a short-term lease to a wholly owned subsidiary of the LHA, such as a single-member limited liability company having the LHA as its sole member.
    a. DHCD would execute an agreement with the LHA specifying that all terms of the state-aided public housing CFA continue to apply irrespective of the bridge conveyance: i.e., it would continue to be treated as state-aided public housing and receive state subsidies, and the LHA would continue to be bound by all state-aided public housing requirements (including the existing CFA) unless and until the

property is sold or leased to a private entity and the LHA enters into a new site-specific CFA.

b. Under this agreement, if the LHA affiliate will not be undertaking the redevelopment itself, no construction could commence under a contract procured without adherence to c. 149 until after the transfer to the ultimate redevelopment entity.

c. The LHA would need to confirm that this arrangement would not impact its PILOT agreement with its municipal government.

d. In addition, if the redevelopment project concerns a federally aided site, the LHA should consult with HUD regarding any federal restrictions on a "bridge conveyance" arrangement.

2. **Enter into an Option to Purchase agreement with an unaffiliated private developer, which would then conduct its own procurement for the project**. DHCD will recognize execution of an enforceable Option to Purchase or Purchase and Sale agreement (such agreement of course being conditioned on appropriate project benchmarks) as sufficient to trigger the Chapter 268 exemption.[4] This should only be done after procurement of a developer partner through a Request for Proposals in full compliance with MGL c. 30B.

In both cases, no construction work should commence until transfer of the property has taken place.

3. *Is a redevelopment project still covered by the Chapter 268 exemptions if a housing authority selects themselves as the developer?*

Chapter 268 exempts redevelopment projects where conveyance to an affiliated non-profit or private entity takes place as described, regardless of what entity serves as the developer.

4. *The law states that DHCD "shall request rates and updates from the division of labor standards"; is it necessary for LHAs to go through DHCD to receive prevailing wage rates on redevelopment projects?*

Upon receiving approval from DHCD, an LHA may act as an agent of DHCD in requesting rates from the division of labor standards for purposes of Chapter 268.

[4] Please note that in the event of a bid protest, the Attorney General's Office holds final authority to rule on the legality of an LHA's procurement action.