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Cancel the Declaration of Trussed

By [David A. Smith](#)

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Four score and nine years ago, housing's forefathers brought forth upon this continent a new tenure concept, conceived in good intentions and dedicated to the proposition that the federal government should deliver affordable housing to low-income Americans, starting with public housing. Since that moment of creation, the United States developed the world's largest, most complicated, most sophisticated, and in many ways most effective, affordable housing ecosystem. However, traditional public housing was left behind during all this upward evolution, leaving it indentured to a system that guarantees failure, whether slow or fast.

This absurdity should end, and it can end now, *if* there is the right political courage.

Public housing was promised 'maximum responsibility and flexibility'

Created in the 1937 Housing Act, American public housing was developed in two great waves, first in the late 1930s with family housing and then in the late 1950s with elderly housing, eventually [totaling 1,400,000 apartments nationwide](#). All of them used a legislative governance structure, codified in multiple clauses of [42 U.S. Code §1437](#), that has three grand principles that I quote directly:

- "The Federal Government cannot through its direct action alone provide for the housing of every American citizen, or even a majority of its citizens, but it is the responsibility of the Government to promote and protect the independent and collective actions of private citizens to develop housing and strengthen their own neighborhoods;
- "The Federal Government should act where there is a serious need that private citizens or groups cannot or are not addressing responsibly;
- "Our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, [State](#), and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector."

To achieve this, the federal government will "vest in Public Housing Agencies [PHAs] that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public."

How's that worked out in practice?

[Cue the laughter from current PHA administrators. – Ed.]



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Step by unwitting step, responsibility and flexibility were stripped away

Public housing was forbidden to mortgage or encumber its property. From the outset, public housing was funded by federal capital grants^[1] to cover the full cost of construction. In exchange, under Section 9 of the 1937 Act, public housing properties executed a Declaration of Trust that prevented the PHA from divesting, encumbering, pledging or otherwise collateralizing its real estate without federal approval. Doubtless the feds wished to prevent the newly created (and therefore inexperienced and unproven) PHAs from being fleeced or suborned into allowing this newly created affordable housing to be flipped to market buyers, resulting in windfall profits to somebody.

Except that the enduring effect has been to prevent public housing from borrowing money, period. With no ability to borrow, PHAs have no ability to raise external capital to fund necessary capital replacements, improvements, or upgrades to keep pace with rising property standards.

Public housing rents were generally set at the projected costs of operations (or less). The original legislation envisioned that, because the property was built with federal cash and would carry no debt burdens, it would naturally be affordable in perpetuity. Just submit your projected costs and reverse-engineer rents to cover those costs, and ipso facto those rents would have to be below market, thus affordable. Why would a public entity need profits?

Except that when a regulator is involved, budget-basing is a [Hobson's Choice](#): submit a high budget and Department of Housing & Urban Development (HUD) will cut it; submit a low one and HUD will approve it. Generating cash flow thus became impossible without fiscal skullduggery.

Public housing was gradually condemned to ongoing negative Net Operating Income. The original “cheap rents, no subsidy” model lasted into the late 1960s, when rising inflation and costs, coupled with poverty concentration in public housing, led to [the Brooke Amendment](#). It capped households’ rents at 25 percent of their income (later raised to 30 percent) and as a consequence introduced annual income verification to a PHA’s duties.

Except that HUD introduced the concept of [federal preferences](#) for choosing incoming households, giving priority to the neediest (read: “the poorest of the poor”). Coupled with means-tested rents, this^[2] drove the properties’ Net Operating Income (NOI) negative — or, in plain language, compelled them to lose cash money every year unless HUD pre-funded those deficits with federal dollars.

Public housing funding varied between fickle and miserly. With the properties now condemned to negative NOIs, HUD became responsible for funding the shortfalls via what came to be known as “[operating subsidy](#),” and separately funding any capital improvements or major maintenance via highly discretionary “modernization funds.”

Except that Congress periodically arrogated unto itself the wisdom to decide to cut PHAs’ aggregate funding below 100 percent because — [well, just because](#).

By the early 2000s, the cumulative effect of these ratchets had turned the statutory language completely on its head. Those whom the Declaration of Trust intended to trust were now thoroughly trussed, which led me to foretell the inventory’s demise in a 2006 article, [The Future of Public Housing: Christmas Yet To Come?](#)

What remains of ‘legacy public housing’ is systemically unsustainable

Fortunately for public housing, I was far from the only person calling for structural change in public housing: In 2012, under the [capable and visionary Shaun Donovan](#), HUD introduced the [Rental Assistance Demonstration](#) (RAD) program. Though widely doubted at the outset, RAD awakened and squelched PHA entrepreneurialism: [Over the course of 13 years](#), RAD has liberated nearly half of all public housing, an astonishing uptake.

Those properties left behind, what I call legacy public housing, experience the worst of all worlds:

- Funding decision protocols with a dysfunctional schism between the PHAs making decisions “in the arena” ([as Teddy Roosevelt described them](#)) and the funding formulas from far away that exist to point out how it could have been done better;
- Perverse incentives for PHAs and public housing tenants, where in both cases appearing poorer than one’s reality is rewarded, and being better off year-over-year is penalized;
- Procedural inefficiencies layered serially atop each other that transformed what was created to be urban workforce housing solution into poverty catchment areas;
- An insular system where one arm of government tries to hold another arm of government accountable, and fails as badly as someone arm-wrestling with themselves.

The preference cascade in favor of RAD is proof that legacy public housing is unsustainable. More properties should go through RAD, and more will. But not all of them, and not fast enough.

What then must we do?

Not only is the current Declaration of Trust contrary to everything we’ve learned since 1937 about how to finance and operate multifamily housing, it virtually mandates indigence. It is a textual relic of a past that no longer exists — it is all of a piece, and any purpose it once served has long been lost. It should go away.

To do so, offer PHAs the opportunity, as-of-right, to swap the entity-level Declaration for a combination of:

- An Annual Contributions Contract that rolls up each PHA property’s last several years of operating subsidy and modernization expenses into a unified funding stream with predictable, external-formal-based annual increases. This then can be parceled out in individual property-level Housing Assistance Payments contracts^[1];
- And ongoing use restrictions akin to a post-Year-15-LIHTC property.

If necessary to accomplish this, pursue statutory authority, but one way or other, don’t reform the Declaration of Trussed – cancel it outright.

[1] From the United States Housing Authority, an instrumentality of the Department of the Interior created along with other New Deal institutions. In 1947 it was absorbed into the Housing and Home Finance Agency, which in turn was one of the organs stapled together in 1966 to create the Frankenstein’s monster we came to know as HUD.

[2] The original federal preferences were repealed in 1998 by the Quality Housing and Work Responsibility Act, but even after their repeal, 40 percent of new public housing admissions and 75 percent of new vouchers must be Extremely Low Income households, at 30 percent of Area Median Income or lower.

[3] For those steeped in HUD lore, this is akin to public housing [demolition/disposition](#) without the demo or the dispo.

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