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A Most Useful Ball of Thread

Nestor M. Davidson

Navigating HUD Programs: A Practitioner's Guide to the Labyrinth
George Weidenfeller and Julie McGovern, eds.
486 pages, 2012
ABA Publishing

Okay, let's be honest. How many people reading this, even those of us fascinated with affordable housing law, could imagine finding anything, well, *interesting* in a 486-page manual on the regulatory minutiae of the programs of the U.S. Department of Housing and Urban Development (HUD)? A show of hands? I thought so.

A wonderful surprise to be found in *Navigating HUD Programs: A Practitioner's Guide to the Labyrinth* (*Navigating*) is that—for all of the tremendous value the book has in immediate practical terms and that it has in spades—it offers glimpses of what makes this area of practice so rewarding: the importance of bringing a transactional attorney's creativity to further vital public purposes.¹ The volume, edited by George Weidenfeller and Julie McGovern, features some of the country's leading affordable housing attorneys ably detailing HUD's core housing and community development programs as well as a number of important cross-programmatic requirements. In the course of doing so, however, the book provides lawyerly insights into how to improve the operations of these programs and,

1. The volume even includes a touch or two of what can be taken either as sardonic humor or perhaps wistfulness at the Sisyphean task at hand (to shift from the labyrinth to different mythological ground). For example, Robert Kenison, the dean emeritus of HUD community development lawyers, opens his chapter with this quote: "We in America today are nearer to the final triumph over poverty than ever before in the history of any land . . . We shall soon with the help of God be in sight of the day when poverty will be banished from this nation." The quote was from Herbert Hoover's 1928 acceptance address. Robert S. Kenison, *Community Development*, in *NAVIGATING HUD PROGRAMS: A PRACTITIONER'S GUIDE TO THE LABYRINTH* 177 (George Weidenfeller & Julie McGovern eds., 2012) [hereinafter *NAVIGATING*].

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given the level of regulatory complexity it reflects, stands as an implicit argument for regulatory streamlining.²

In Greek mythology, Theseus is said to have survived King Minos' labyrinth with the help of a ball of thread the king's daughter Ariadne had secretly given him.³ The experts that Weidenfeller and McGovern have gathered have likewise handed practitioners—newly minted and veterans alike—an invaluable tool to manage their way through a maze of HUD statutes, regulations, handbooks, notices, and everyday practice. *Navigating* will be of interest not only to housing lawyers but, given the clarity of its insights into so many important programs, to academics and policy-makers interested in affordable housing and community development law as well.

This review begins by briefly summarizing *Navigating*, discusses the hints the volume offers for reform, and concludes by exploring ways in which the book's guidance suggests potential benefits in nascent HUD efforts at programmatic consolidation and modernization.

Following the Thread

Regular readers of this *Journal* will already be familiar with *Navigating*'s basic scope,⁴ but the richness of the volume bears a slightly more detailed summary. At the heart of the book are chapters that cover the Federal Housing Administration's (FHA) Multifamily Housing Insurance⁵ and Healthcare and Hospital Financing programs;⁶ the Section 202 Supportive Housing for the Elderly program;⁷ Core Community Development Block Grant⁸ and Neighborhood Stabilization programs;⁹ public housing

2. The labyrinth is even more complex than *Navigating* suggests, given that most projects supported by HUD require other subsidies, which means that counsel picking their way through the HUD maze must often overlay additional complexity from programs such as the low-income housing tax credit (LIHTC) and tax-exempt bonds, as well as state and local subsidies, all which have their own requirements and institutional structures to manage.

3. EDITH HAMILTON, *MYTHOLOGY* 212 (1942).

4. See Julie S. McGovern & George L. Weidenfeller, *Navigating HUD Programs: A Practitioners' Guide to the Labyrinth*, 21 J. AFFORDABLE HOUSING & CMTY. DEV. L. 73 (2012).

5. Elizabeth H. Friedgut & Dianne S. Pickersgill, *Navigating HUD Programs: The 2530 Previous Participation Approval Process*, in *NAVIGATING*, *supra* note 1.

6. Kristin M. Neun & Andrea R. Ponsor, *Health Care and Hospital Financing*, in *NAVIGATING*, *supra* note 1.

7. Karen Sherman & Michael Decina, *HUD Section 202 and Mixed Finance Guide for Development and Operation of Supportive Housing for the Elderly*, in *NAVIGATING*, *supra* note 1.

8. See Kenison, *supra* note 1.

9. Laura Schwarz, *Community Planning and Development: Emerging Neighborhood Stabilization Programs*, in *NAVIGATING*, *supra* note 1.

mixed-finance development¹⁰ and operations;¹¹ and Section 8, both project-based and tenant-based.¹² As befits the experience that most of the authors have, the program summaries work from the orderly perspective of how a transactional lawyer would want to understand the relevant requirements.¹³ Indeed, in a number of instances, the authors give the kind of practical, here's-how-HUD-actually-interprets-a-given-requirement advice that can be invaluable for practitioners who are not repeat participants in a given practice area.¹⁴

The remainder of the chapters in *Navigating* provide more detail on specific HUD policy priorities—such as multifamily housing preservation;¹⁵ workouts for troubled HUD-insured multifamily and health-care loans;¹⁶ and HUD's approach to energy, utilities, and green building¹⁷—or address cross-cutting requirements and institutional structures, including the 2530 prior participation approval process,¹⁸ procurement, labor

10. Roberta L. Rubin, *Public Housing Development—Mixed Finance in the Context of Historical Trends*, in *NAVIGATING*, *supra* note 1.

11. Melissa K. Worden & William J. Ward, *Public Housing Operations*, in *NAVIGATING*, *supra* note 1.

12. Michael H. Reardon & Tatiana Gutierrez Abendschein, *The Section 8 Housing Assistance Program*, in *NAVIGATING*, *supra* note 1.

13. Schwanitz's and Bissinger's chapter on FHA's multifamily programs, for example, follows a transactionally oriented progression that starts with general requirements, moves to program-specific variations, and then drills down on the approval process and the closing process. Brianne N. Schwanitz & Charles C. Bissinger Jr., *FHA Multifamily Programs: General Overview and Recent Developments*, in *NAVIGATING*, *supra* note 1. Moreover, the chapter usefully does so at a time when HUD has just revamped the entire multifamily housing transactional structure. See Ann vom Eigen & Damon Y. Smith, *HUD'S Multifamily Rental Project Closing Documents: Modernizing FHA Multifamily Financing*, 26 *PROB. & PROP.* 12 (2012).

14. For example, Neun and Ponsor observe that the handbook that governs the active Section 242 hospital finance mortgage insurance program dates back to 1973, but also note that HUD has indicated that publication is pending of an updated version that conforms to current standards, HUD will provide necessary waivers. Neun & Ponsor, *supra* note 6, at 117. Similarly, Nesbitt and Niles note that for mortgages grappling with troubled HUD-insured loans, the current Partial Payment of Claim (PPC) Handbook requires restructuring proposals to be submitted within sixty days of loan default, but add that "HUD has generally been willing to consider PPC proposals that are submitted to HUD after (and sometimes, well after) such 60-day period." La Fonte Nesbitt & Stephen Niles, *Resolution of Troubled or Defaulted HUD-Insured Multifamily and Health-Care Loans*, in *NAVIGATING*, *supra* note 1 (citing Revised PPC HANDBOOK § 14-7).

15. John Daly, *Multifamily Housing Preservation*, in *NAVIGATING*, *supra* note 1.

16. Nesbitt & Niles, *supra* note 14.

17. N. Linda Goldstein, *Looking to the Future—The Heat is On: Trimming HUD's Energy Bill for Public and Privately Owned Assisted Housing*, in *NAVIGATING*, *supra* note 1.

18. Friedgut & Pickersgill, *supra* note 5.

provisions, environmental requirements, relocation requirements, subsidy layering, and regulatory waivers,¹⁹ as well as enforcement²⁰ and civil rights requirements.²¹ All told, between program-specific insights, particularly for HUD's multifamily mortgage insurance programs, and operational details that apply to multiple facets of HUD's work, the book manages to address an impressive swath of HUD-related practice.

In all of this detail, *Navigating* is quite up-to-the-minute, which is a distinctive strength of the volume. To cite a few examples, John Daly's chapter on preservation discusses the implications of temporary authority for HUD to transfer existing funding sources that was granted in HUD's fiscal year 2012 appropriations act.²² Karen Sherman and Michael Decina likewise note that HUD has proposed new regulations to streamline aspects of certain Section 202 projects, with comments that were due just before the book's publication.²³ Melissa Worden and William Ward discuss the still-pending proposed Affordable Housing and Self-Sufficiency Improvement Act of 2012.²⁴ And Kevin McMahan and Robert Hazelton note that American Recovery and Reinvestment Act of 2009 (ARRA) funds for the HUD/Department of Energy collaboration on the Weatherization Assistance program had an expenditure deadline of March 2012,²⁵ with some states receiving three- to six-month extensions.²⁶ This gives just a few examples—there are many others in the book—of the immediacy of the discussion throughout *Navigating*.

This attention to even the most recent changes in program requirements is going to pose a challenge for the editors going forward, but also presents a great opportunity for the ABA Forum on Affordable Housing and Community Development Law. With the strong foundation that *Navigating* has now put in place, the Forum can and indeed should provide regular updates, either in an online companion that tracks chapter-specific materials or with periodic supplements to the book.²⁷ It is a testa-

19. These six examples and a few other related requirements are all covered in one chapter. Mary Grace Folwell, Amy M. Glassman, Amy M. McClain, Joy C. O'Brien, Nydia M. Pouves, Margaret H. Tucker, & Sharon Wilson Genó, *Cross-Cutting Requirements: Federal Requirements Impacting HUD Programs*, in *NAVIGATING*, *supra* note 1.

20. Margarita Maisonet, *Compliance and Enforcement*, in *NAVIGATING*, *supra* note 1.

21. Harry Carey, *Civil Rights Programs Administered and Enforced by HUD*, in *NAVIGATING*, *supra* note 1.

22. See Daly, *supra* note 15, at 81–82.

23. See Sherman & Decina, *supra* note 7, at 140.

24. See Worden & Ward, *supra* note 11, at 302.

25. *Navigating* was published a scant two months later in May 2012.

26. See Goldstein, *supra* note 17, at 349. See also *id.* at 341 (noting that “[a]s this book goes to print, HUD is reviewing responses to its Notice of Funding Availability” for a newly authorized energy pilot program).

27. This *Journal* might be another venue to update *Navigating* from time to time.

ment to the vibrancy of the programs *Navigating* tackles that HUD regularly tinkers and sometimes overhauls the governing requirements. The Forum now has a platform to organize the engagement of its members with those developments.²⁸

Given its breadth and practical details, *Navigating* occupies a crucial middle ground between books focused on housing law at a higher level of abstraction²⁹ and those that offer more specialized insights into individual programs.³⁰ Although some of the descriptions in *Navigating* will seem too basic for attorneys who work regularly in a given area, very few housing lawyers have expertise in all of the varied HUD programs that the book covers, and each chapter provides valuable background to help orient practitioners beginning to branch out beyond their core competence and experience. By covering all of the major HUD programs in a consistently accessible format, *Navigating* will become a standard reference for anyone practicing in this area.

A View from within the Maze

Having followed Weidenfeller and McGovern's string to the heart of the labyrinth and back, it bears noting that there is something of a missed opportunity in the approach taken in *Navigating*: its authors do not offer more direct insights into how HUD and its partners could continue to improve the tools the department makes available through its programs. Although *Navigating* is a practitioner's guide and not an advocacy manual, there are a few places in the book where the authors, as practicing lawyers who regularly interface with HUD, let slip a word or two of advice or at least hint at some frustration that could be channeled into practical change, potentially providing a template for reform.³¹

28. I also encourage the editors to consider adding material in future editions that links the program discussions in *Navigating* more fully to the most common resources that practitioners combine with these HUD subsidies, notably the LIHTC and various tax-exempt bond programs. The chapter on multifamily housing preservation, for example, briefly touches on the LIHTC program in the context of equity funding for preservation, see Daly, *supra* note 15, at 94–96, as do sections on Section 202 mixed finance deals, see Sherman & Decina, *supra* note 7, at 133–38, public housing mixed finance, *id.* at 277, and the subsidy layering review process, see Rubin, *supra* note 10, at 409. But there would be real value in a more detailed discussion of how HUD's programs work with the other subsidies with which they are regularly paired.

29. The ABA's *Legal Guide to Affordable Housing Development* (Tim Iglesias & Rochelle Lento eds., 2011), for example, is a valuable, albeit more general, overview of legal issues in a range of affordable housing programs.

30. Novogradac & Co.'s *Low-Income Housing Tax Credit Handbook* (2012), the standard reference guide to the LIHTC program, is an example of this kind of focused, single-program treatise.

31. *Navigating* does include a brief epilogue that discusses the need to protect HUD's budget at a time of increasing need; notes improvements to FHA manage-

One concern that surfaces repeatedly in *Navigating* is that HUD could be clearer as to which requirements actually govern in any given transactional context. In their chapter on FHA's multifamily programs, for example, Brianne Schwanitz and Charles Bissinger note that it can be hard for practitioners to find definitive guidance, detailing potential conflicts among Housing Notices (even expired ones that are still relied upon), HUD Handbooks, the Multifamily Accelerated Processing (MAP) Guide, and other sources.³² The 2530 regulations, Elizabeth Friedgut and Dianne Pickersgill note, and the 2530 Handbook "do not always conform to current HUD policies and practices, which are most accurately, although not completely, expressed in the User Guide,"³³ and HUD's collective guidance does not cover several key issues.³⁴ And Roberta Rubin points out that HUD's public housing mixed finance guidance can be inconsistent with governing regulations and current practice.³⁵

A former colleague of mine at HUD used to say in meetings that no one should be able to raise a concern without also offering a solution. The authors selected for this volume are extremely well suited to facilitate the kind of problem solving that would assist HUD in its mission. This is

ment; touches on changes potentially on the horizon for the Office of Community Planning and Development (CPD), Public and Indian Housing (PIH), and Fair Housing and Equal Opportunity (FHEO); and mentions the increasing importance of sustainability across HUD's programs. See Kenison, *supra* note 1, at 463-65.

32. As Schwanitz and Bissinger note, "[i]n many instances, the Handbooks have been superseded by the MAP Guide . . . [h]owever, for those projects processed using TAP [Traditional Application Processing procedures], the Handbooks remain a primary source of guidance. . . . [I]f there is a conflict between the MAP Guide and a Handbook, the MAP Guide takes precedence, but if the MAP Guide is silent on a matter, the lender should consult with HUD." Schwanitz & Bissinger, *supra* note 13, at 5. Daly similarly notes that the guidance and application procedures for decoupling Interest Reduction Payments under Section 236 of the National Affordable Housing Act technically expired over a decade ago. See Daly, *supra* note 15, at 86. He also notes that the Mark-to-Market program was enacted as a temporary measure in 1997 but has been extended to the end of FY 2015, raising a number of legal issues that were not initially contemplated. See *id.* at 93.

33. Friedgut & Pickersgill, *supra* note 5, at 157; see also *id.* at 163 n.23 (noting that staff guidance on 2530 coverage "is contrary to official HUD guidance"). Similarly, in her review of the Neighborhood Stabilization programs (NSPs), Schwarz details potential areas of confusion created by NSP-related notices from CPD. See, e.g., Schwarz, *supra* note 9, at 228.

34. See Friedgut & Pickersgill, *supra* note 5, at 166-69.

35. See Rubin, *supra* note 10, at 255; see also *id.* at 259 ("Practitioners should be aware that HUD frequently introduces new forms and templates to use in mixed-finance submissions, not all of which are prominently displayed on HUD's mixed-finance web page; many of these tools have not been formalized by inclusion in regulations, handbooks, guidebooks, or other formal HUD guidance but nevertheless will be required by HUD as a condition of approval.").

not to detract from the great value of what *Navigating* does accomplish, but just to note that it is a bit of a missed opportunity with a line-up of contributors with so much practical wisdom not to have included more explicit suggestions for areas where HUD might improve its practice.³⁶ My sense is that policy staff and the attorneys in HUD's Office of General Counsel are open to such feedback. Although there are practical limitations to HUD's ability to keep all of its myriad guidance updated and consistent at a time of dwindling staff resources and ever-increasing programmatic complexity, input from thoughtful practitioners is helpful in flagging areas where such clarification is most needed. The hints that *Navigating* offers of such flags give a tantalizing glimpse of what more could have been done on this score.

Unwinding the Labyrinth

Finally, to shift from what *Navigating* does and what it could have done more, to what the enterprise implies, it is hard to walk away from *Navigating*—which for all of its detail really just begins to scratch the surface of a subset of affordable housing and community development subsidies—without the sense that surely there are constructive ways to consolidate and streamline the myriad of programs it details.³⁷ A unified field theory of housing and community development law would be too much to ask for, given that many programs appropriately have specialized requirements that reflect their distinctive goals. That said, however, a great number of the programs covered in *Navigating* functionally do essentially the same thing: provide a subsidy to, or on behalf of, a low-income resident to provide quality, affordable housing.

The Obama administration is likely to be remembered from a lawyer's perspective for bolstering transactional support at a time when programs such as FHA multifamily insurance have become much more central to the market and for seeing through long-languishing initiatives such as the modernization of the basic suite of FHA multifamily closing docu-

36. *Navigating* offers a few other suggestions for programmatic improvement, such as Robert Kenison's suggestions for reconsidering how the Community Development Block Grant (CDBG) program measures lower income benefit, see Kenison, *supra* note 1, at 192–93, and Linda Goldstein's suggestions for balancing energy priorities without burdening small housing authorities, see Goldstein, *supra* note 17, at 339, to cite two examples.

37. HUD was created in 1965 as a polyglot combination of several existing agencies with very different missions, including the Federal Housing Administration, the Housing and Home Finance Agency, and the Public Housing Administration, among others. See 42 U.S.C. § 3534 (2006). Over the years, there has been a steady accretion of programs—very few ever seem to disappear—but the challenges from this complexity cross program silos as well as what should be very similar program structures in similar areas.

ments and related requirements.³⁸ However, a pilot HUD program currently under way may end up being equally, if not more, significant to housing lawyers in the long run. The administration's nascent efforts to streamline through what is known as the Rental Assistance Demonstration (RAD) is generally focused on goals such as preservation through increased ability to access private capital for capital needs.³⁹ RAD allows public housing agencies to convert to long-term, project-based Section 8 contracts and allows owners of projects funded under Section 8 Mod Rehab, Rent Supplement, and Rental Assistance Payment programs to convert tenant protection vouchers to project-based vouchers.⁴⁰

Implicit in the design of RAD is a process of programmatic consolidation built around the common platform of project-based Section 8, a consolidation that could provide a template for future convergence if it proves successful.⁴¹ Such a convergence is not guaranteed to reduce the complexity left by decades of programmatic accretion, but it offers hope that one benefit of RAD might be a roadmap for future programmatic streamlining. The creativity of the kinds of attorneys represented by *Navigating's* authors is at once a testament to the often unwieldy legal requirements that can be honed into sharp and innovative tools, and HUD is certainly an active partner in that endeavor. But *Navigating* serves as a reminder that managing the complexity of the system could be much more straightforward. Whether or not RAD lives up to its promise, HUD efforts to be more efficient find support in the level of complexity—and transactional challenges—that the authors of *Navigating* recount.

38. See vom Eigen & Smith, *supra* note 13. As Schwanitz and Bissinger note, in the months preceding the publication of *Navigating*, HUD issued new FHA multi-family closing documents and a new Closing Guide, corresponding regulatory changes, an updated MAP Guide, and new mortgagee letters and notices, all of which “represented a major overhaul of the established guidance, the likes of which had not been seen in decades.” Schwanitz & Bissinger, *supra* note 13, at 72.

39. See Rental Assistance Demonstration: Processing of Conversion Requests Submitted Under the Partial Rental Assistance Demonstration Notice, 77 Fed. Reg. 14,029 (Mar. 8, 2012). There is also a resident-mobility component to RAD that is designed to test “the extent to which residents have increased housing choices after the conversion.” *Id.*

40. *Id.*

41. *Navigating* mentions this new initiative briefly. See, e.g., Worden & Ward, *supra* note 11, at 312 (noting that the newly authorized RAD “could result in a major overhaul and conversion of public housing stock”); see also George Weidenfeller & Julie McGovern, *Epilogue—Looking to the Future*, in *NAVIGATING*, *supra* note 1.

Conclusion

Weidenfeller and McGovern deserve ample credit for the insights they have assembled into what can indeed seem like a labyrinth of HUD requirements. One need not agree with the editors that monsters lurk at every turn in managing these requirements⁴² to recognize their accomplishment in providing a readable, comprehensive, and, yes, interesting thread through the maze. *Navigating* is sure to become required reading.

42. See George Weidenfeller & Julie McGovern, *Preface*, in *NAVIGATING*, *supra* note 1 (quoting HAMILTON, *supra* note 3, at 212 ("In whatever direction they ran they might be running straight to the monster . . .")).

