

AUTHORED ARTICLES &amp; PUBLICATIONS | JAN 10, 2017

# HUD Issues New Broadband Mandates

Rules Ensure Broadband-Ready Developments



By Gerard Lederer and Drew Clark\*

New and substantially rehabilitated public housing must now be planned and built to ensure that broadband Internet service is available to its residents. The requirements come from the final version of two federal regulations issued last month by the U.S. Department of Housing

and Urban Development.

Real estate developers and builders have new obligations under one of the rules, [“Narrowing the Digital Divide Through Installation of Broadband Infrastructure in HUD-Funded New Construction and Substantial Rehabilitation of Multifamily Rental Housing”](#) (published Dec. 20). For new public housing construction, these obligations begin on Jan. 19, although the requirements kick in for federal block grant funds on April 19, and state block grants on July 18.

In addition to the rule for building or retrofitting public housing to include broadband, local and state governments that provide public housing must now systematically include both broadband and natural hazard planning within a document that is a key HUD mechanism for the distribution of federal housing dollars. That document is the “Consolidated Plan,” and must be properly submitted — with the new elements pertaining to broadband and resilience to natural hazards — by Aug. 16 in the fiscal year prior to funds being disbursed. The failure to do so will automatically result in that government entity’s forfeiture of Community Development Block Grants to which the jurisdiction would otherwise be entitled.

In particular, the requirements of the new rules that bear upon government jurisdictions, [“Modernizing HUD’s Consolidated Planning Process To Narrow the Digital Divide and Increase Resilience to Natural Hazards”](#) (published Dec. 16), require planners to consult with a whole new set of public and private stakeholders. While the new rules may be included in a review of late-published

## People



**Gerard Lavery Lederer**

PARTNER

(202) 370-5304

## Related Practices

[Municipal Law](#)

[Telecommunications](#)

## Related Industries

[Municipal](#)

rules established by the Obama Administration, by Congress or the Trump Administration, these regulations could well fly beneath the policy radar of the incoming administration.

HUD views the new regulations as a means of ensuring that future HUD-funded properties are broadband ready. “We are making long-term investments in the 21st Century global economy that go beyond modems and laptops,” HUD Secretary Julián Castro said in a press release. “We want to give our residents and their children the opportunity to bridge the digital divide by connecting to the world of opportunity.”

Under the final rule governing installation of broadband, any new and substantially rehabilitated public housing project of four or more units must include infrastructure capable of supporting broadband access to residents as of Jan. 19, unless the federal fund recipient can document one of the following three grounds for waivers:

- Location of property makes it infeasible;
- Costs of broadband infrastructure deployment changes the nature of the project or is an undue financial burden; or
- Nature of the structure being rehabbed makes installation infeasible.

There is little guidance given as to what needs to be provided to obtain a waiver under the three criteria.

The new rule considers a project is “substantially rehabilitated” when it is either a complete replacement of the electrical system or other work for which the pre-construction cost estimate is equal to or greater than 75 percent of the electrical system’s replacement cost; or rehabilitation of housing in which the pre-construction estimated cost is equal to or greater than 75 percent of the total estimated cost of replacement.

Under the new regulation, “broadband infrastructure” is defined to include cable and fiber optic wiring, as well as wireless infrastructure, that is capable of meeting the FCC’s definition of “advanced telecommunication capability.” The FCC currently defines that term as broadband with at least 25 Mbps of downstream capability, and 4 Mbps of upstream capability.

While the rule applies to 10 different public housing programs, it does not apply to multifamily rental housing that only has a mortgage insured by HUD’s Federal Housing Administration or with a loan guaranteed under a HUD loan guarantee program.

Under the rule governing the Consolidated Plan, any plans filed after Jan. 1, 2018 must demonstrate broadband and natural hazard planning, including documentation that includes data and evidence, of the newly mandated

consultations.

The Consolidated Plan is designed to help states and local governments assess their affordable housing and community development needs and make data-driven, place-based investment decisions. The Consolidated Planning process serves as the framework for a community-wide dialogue to identify housing and community development priorities that align and focus funding from HUD's formula block grant programs.

The new groups with which local and state governments must consult includes broadband Internet service providers, organizations engaged in seeking to narrow the digital divide and promote digital inclusion (including schools and digital literacy organizations), as well as agencies that manage flood-prone areas, public land or water resources and emergency management agencies.

A draft version of the rule included language requiring jurisdictions preparing Consolidated Plans to consult the National Broadband Map, a project of the Federal Communications Commission and the U.S. Department of Commerce, as well as broadband availability data from the FCC. However, the final rule omitted the requirement to consult any particular source of data, but it still requires both the consultations and the inclusion of such information within the Consolidated Plan.

Best Best & Krieger first wrote about in the two mandates in August 2016 for PublicCEO. As noted in that [article](#), the predicate for HUD's actions can be found in a White House report on broadband growth, which found that 93 percent of families with incomes of more than \$100,000 in 2013 had high-speed Internet access at home, compared to just 43 percent of households making less than \$25,000.

As noted above, both regulations provide limited clarification on key points. We suggest that you contact legal counsel for more information.

*Originally published by [PublicCEO.com](#) on Jan. 10, 2017. Reprinted with permission.*

*\*Drew Clark is no longer with BB&K. If you have questions about this article, please contact [Gerard Lederer](#).*