units that propose the use of tenant-based assistance under Section 8 having a term of not less than five years for the replacement of not more than 50 percent of the units to be demolished or disposed of, the use of Section 8 tenant-based assistance (Existing Housing rental certificates) for replacement housing requires a two-part finding by HUD that (1) project-based assistance (including public housing, as well as other types of project-based assistance) is not feasible under the program standards or under any combination of these programs, and (2) private rental housing is actually available to those who would be assisted under the plan and that the supply of such housing is sufficient for the total number of rental certificates and rental vouchers available in the community and is likely to remain available for the full 15-year term of the assistance. This two-part finding must be based on objective information, such as the following statutory data elements: Rates of participation by landlords in the section 8 program; size, conditions and rent levels of available rental housing as compared to section 8 standards; the supply of vacant existing housing meeting the section 8 housing quality standards with rents at or below the fair market rent, or the likelihood of adjusting the fair market rent; the number of eligible families waiting for public housing or housing assistance under section 8; and the extent of discrimination against the types of individuals or families to be served by the assistance.

To justify the two-part finding, the PHA must provide sufficient information to support both parts of the finding—why any and all combinations of project-based assistance are not feasible and how the conditions for tenant-based assistance will be met, based on the pertinent facts of the particular local situation.

The determination as to the lack of feasibility of project-based assistance must be based on the standards for feasibility stated in the regulations pertaining to each type of eligible project-based program identified in § 970.11, including public housing, as well as the other types of eligible Federal, State and local programs. Thus, a finding of lack of feasibility may be made only if the applicable feasibility standards could not be met under *any* of the eligible programs, or any combination of them. For example, with regard to the feasibility of additional public housing development, relevant factors would include local needs for new construction or rehabilitation, availability of suitable properties for acquisition or sites for construction, and HUD determinations under cost containment policies.

The second part of the finding—availability of housing for tenant-based assistance—is a matter of whether the facts concerning local need and housing supply justify such a finding. Above are listed the statutory data elements on which a finding should be based. HUD may require additional data as may be relevant in particular circumstances.

Note: The statutory limitations discussed above do *not* apply to applications for demolition or disposition of 200 or more units that propose the use of tenant-based assistance under section 8 having a term of not less than 5 years for replacement of not more than 50 percent of the units to be demolished or disposed of.

Section 121 of the 1987 Act prohibits the use of rental vouchers for replacement housing. However, the Department has determined that rental vouchers may be an acceptable *relocation* housing resource, provided the displaced tenant is given referrals to suitable/comparable replacement housing (comparable housing, if the URA applies) where the rent paid by the tenant following relocation will not exceed the amount permitted under section 3(a) of the 1937 Act. (See § 970.5(b)). The PHA can meet its relocation housing obligation by providing a housing voucher and referrals to units that fall within the voucher payment standard and are owned by a person who agrees to rent to a voucher holder. The rule also makes the PHA responsible for payment of moving expenses and the provision of appropriate advisory services, including timely information notices, counseling, and the inspection of housing to which persons relocate.

The statutory restrictions on types of housing assistance that may be counted as replacement units do *not* apply to relocation. For example, tenants may relocate to other existing public housing units, or to privately owned housing, with rental certificate or rental voucher assistance, as qualified above. The purpose of relocation is to assure that all displaced families obtain other suitable/comparable housing at affordable rents, while the purpose of one-for-one replacement is to assure that the total low-income housing stock available is not diminished.

Public Comments

As a result of the interim rule published on August 17, 1988, at 53 FR 30984, public comments were received from six commenters: Three legal services organizations, one public housing agency, one community development organization, and one national association.

The commenters raised a variety of issues concerning the applicability of part 970, including whether (1) the 1987 Act amendments are applicable retroactively, (2) ''units approved for deprogramming'' before the effective date of the 1987 Act should be exempted, and (3) the exemption for homeownership sales to tenants should be retained. Below is a discussion of these issues, as well as some others raised by the commenters, and the Department's responses to them.

Retroactivity

Some commenters argued that the 1987 Act amendments should be applicable retroactively to cases where demolition or disposition was approved by HUD but not completed by the PHA before February 5, 1988, the effective date of the 1987 Act. These commenters maintained that even before the 1987 Act, section 18 of the 1937 Act required replacement housing in all instances of demolition or disposition of housing units, and that the 1987 amendments did not change the statutory requirements for replacement, but merely corrected an erroneous interpretation by HUD in the then-existing regulations.

The effect of acceptance of this argument would be to revoke those pre-1987 Act approvals, requiring the PHA to meet all added requirements under the 1987 Act and obtain a new HUD approval. The Department does not believe this effect to be defensible and disagrees with the commenters for the reasons set forth below.

HUD's first regulation on the demolition and disposition of public housing was published as a final rule (24 CFR part 870) on November 9, 1979 (44 FR 65368). At that time, the statutory language on this issue afforded HUD considerable administrative discretion as to regulatory policy. (See sections 6(f) and 14(f) of the 1937 Act). Neither these statutory provisions nor their legislative history contain any mention of replacement housing (except in connection with relocation), thus allowing HUD administrative rule making discretion on this issue. HUD exercised that discretion by providing in the 1979 regulation that ''If there is a local need for low-income housing, the PHA's request for demolition or disposition of dwelling units shall include a plan for replacement housing on a one-for-one basis or as approved by HUD to be warranted by current and projected needs for low-income housing and subject to HUD's findings as to the availability of funds.'' Thus, subject to