

Legal Opinion: CIM-0109

Index: 3.300
Subject: LIHPRHA Use Agreement

February 17, 1995

Stephen J. Wallace, Esquire
Peabody & Brown
1255 23rd St., N.W.
Washington D.C. 20037

Dear Mr. Wallace:

This is in reference to your January 5, 1995 letter regarding your concern about the paragraph in the new Use Agreement and Amendment of Existing Regulatory Agreement (Use Agreement) for properties with approved Plans of Action pursuant to the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA) which is titled "Subsequent Statutory Amendments" (The paragraph is Number 23 in the Section 221(d)(3) form Use Agreements and Number 25 in the Section 236 form Use Agreements).

Paragraphs 23 and 25 provide that an owner of a property, which is eligible for assistance under LIHPRHA, who executes a LIHPRHA Use Agreement, agrees that, if subsequent statutory amendments require revisions to that Use Agreement, the owner will make the required revision. In addition, the paragraph puts the owner on notice that HUD may implement such statutory amendment by rulemaking. In your letter, you state that you object to this provision because, among other reasons, the language is too broad, creates an illusory promise, and gives HUD too much discretion.

The paragraphs in question are not overly broad. The revisions required by these paragraphs are specifically limited to those changes to the program necessitated by the actions of Congress. HUD would have no alternative but to comply with those actions. In addition, the language contained in the paragraphs does not create an illusory promise on the part of HUD. The concept of "illusory promises" encompasses the idea that, where one party has "complete discretion whether or not to perform" and "has in fact made no promise at all," there is no consideration and, thus, no contract is formed. *Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522, 1535 (1983); See Samuel Williston, *A Treatise on the Law of Contracts*, 4th ed., Section 7.7 (1992); See also, E. Allan Farnsworth, *Contracts*, 2d ed., Section 2:13 (1990).

The government, like any other party, is free to enter into binding contracts that are subject to a right to modify. *Madera Irrigation District v. Hancock*, 985 F.2d 1397, 1405 (9th Cir. 1993). Modification clauses do not create illusory promises unless a party reserves for itself an unlimited power to escape all obligations for whatever reason. *Id.* Clearly,

Paragraphs 23 and 25 do not give the government the complete discretion to escape its contractual obligations under the Use Agreements. The paragraphs provide that the Use Agreements are to be modified by HUD and the owners only if "necessitated by subsequent statutory amendments." In the execution of the Use Agreements, HUD binds itself to perform certain obligations which include the payment of incentives to the owner. The obligations created by the Use Agreements, even though subject to possible modification in the future, create a valid contract.

Paragraphs 23 and 25 do not give HUD any discretion that it does not already have by law. The language is merely a written expression of the principle that, in the performance of its contractual obligations under the Use Agreement, the United States retains its sovereign power. Many statutes and contracts executed by the government contain such provisions. The United States may amend laws and, consequently, alter the terms of contracts to which it is a party under the "entrenched legal doctrine" of sovereign power. *Parkridge Investors Ltd. Partnership v. Farmers Home Admin.*, 13 F.3d 1192, 1194 (8th Cir. 1994); See also, *Bowen v. Pub. Agencies Opposed to Social Security Entrapment*, ("POSSE") 477 U.S. 41 (1986). Enacting legislation is one of Congress' "most vital powers" as sovereign. *Parkridge Investors*, 13 F.3d at 1198. The Supreme Court has cautioned courts not to construe contracts involving the United States as preventing Congress from exercising its sovereign power to alter contractual provisions. POSSE, at 52.

Express reservation of the right to enact legislation which alters or amends the United States' contractual obligations, however, is not necessary in order to exercise sovereign power. POSSE, at 52; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982); *Delaware v. Cavazos*, 723 F. Supp. 234, 242 (D.Del. 1989). The United States retains its sovereign power unless surrendered in "unmistakable terms." *Merrion*, at 148. Therefore, the Use Agreements executed pursuant to LIHPRHA would remain subject to future amendments even if they did not contain the specific language set out in paragraphs 23 and 25.

In view of the foregoing, we conclude that the paragraphs, as presently written, will remain a part of LIHPRHA Use Agreements. HUD makes the LIHPRHA incentives available to the owner in return for the owner's acceptance of the conditions set out in the Use Agreement. If the owner elects not to execute the appropriate Use Agreement, the LIHPRHA incentives would not be available to the project, and the project would remain under the restrictions then in place for the remaining term of the mortgage.

I hope this letter resolves your concerns regarding this matter. If you have any further questions, please contact

Stuart Malmon at 202-708-4167 or Athena Katcheves at 202-708-3667.

Sincerely,

Monica Hilton Sussman
Deputy General Counsel
Programs and Regulations