

Legal Opinion: CIM-0113

Index: 3.600
Subject: Boston Rent Control - Preservation

July 20, 1995

Howard E. Cohen, Esq.
Mintz, Levin, Cohn, Ferris,
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One Financial Center
Boston, MA 02111

Dear Mr. Cohen:

This is in response to your letters regarding a November 23, 1994 memorandum from Nelson A. Diaz, General Counsel, to Sharon Matthews Swain, then Acting Assistant General Counsel for New England ("November Memorandum"), which discusses the application of vacancy decontrol certificates to the appraisal process under the Emergency Low-Income Housing Preservation Act of 1987 ("ELIHPA").

It is our understanding that you represent the owners of Burbank Apartments, Cummins Towers and Florence Apartments and are concerned whether the November Memorandum will be applied to the appraisals completed for the above-reference projects. As you are aware, HUD has already entered into Section 8 Housing Assistance Payments ("HAP") Contracts and Use Agreements with the owners. Consequently, HUD will not require the owners to reappraise the projects in accordance with the November Memorandum.

Our Office has consulted with the Office of Housing, and they have decided to process the Section 241(f) loan applications for Burbank Apartments and Cummins Towers using the appraisals already conducted and the Plans of Action already approved. The Office of Housing, however, will update the Preservation Capital Needs Assessment to make sure all of the necessary repairs are completed.

You also indicated that you believe that the November Memorandum is based upon a faulty premise about how the Boston Rent Equity Board ("Board") works with respect to the issuance of vacancy decontrol certificates. We disagree. The November Memorandum makes clear that, during the term of the insured mortgage, HUD preempts all local rent control laws as applied to federally subsidized projects under 24 C.F.R. Section 246.21. There is no basis for appraisers to take into account the vacancy decontrol certificates issued by the Board at a time when the Board, by reason of Federal preemption, had no jurisdiction over the subject matter of rents in the federally-insured projects. Therefore, the Office of Housing has decided that the November Memorandum will be applied prospectively to projects where HUD has not executed Use Agreements and Section 8 HAP Contracts.

You state in your May 22, 1995 letter that under prior OGC opinions the application of vacancy decontrol certificates to the appraisal process would be an issue of local law for which appraisers have been advised to rely upon the opinion of local counsel for guidance. It is within the Department's authority to construe the regulations implementing its programs including the Local Rent Equity provisions of 24 C.F.R. Part 246 and the effect that those provisions have on the authority of a local rent control entity over a project for which HUD has preempted the field of rent regulation. In doing an appraisal, the appraisers must assume, among other matters, that existing low income restrictions imposed by HUD have been removed and must take into account the effect that rent control would have on the unsubsidized fair market value. In carrying out this responsibility, however, there is no basis for appraisers to take into account actions taken by the Board at a time when the Board, by reason of Federal preemption, had no jurisdiction over the subject matter of rents in the projects. While it is the appraiser's responsibility to determine the costs of compliance with any State or local laws of general applicability, including rent control laws, it is within the Department's authority to determine whether Federal regulations or statutes preempt State or local laws.

I trust this letter addresses your concerns. If you have any questions, please contact Gayle E. Bohling at (202) 708-4107.

Sincerely,

John J. Daly
Associate General Counsel
Insured Housing