

Legal Opinion: CIM-0117

Index: 3.122

Subject: Archer Courts Use Agreement

April 30, 1999

MEMORANDUM FOR: Lewis Nixon, Assistant General Counsel
for the Midwest, 5AC

FROM: John J. Daly, Associate General Counsel,
Office Of Insured Housing, CI

SUBJECT: Archer Courts Use Agreement

This is to respond to your memorandum to me of March 17, 1999 and Robert S. Kenison, Associate General Counsel, Office of Assisted Housing and Community Development, and to confirm conversations between Mel Belin of my staff and Joseph Strobel of yours. Before addressing the above, I note that Michael H. Reardon, Assistant General Counsel for Assisted Housing, who works for Mr. Kenison, noted in a March 25, 1999 e:mail to you that the above memorandum involved essentially a legal question for me, and a policy question for the Office of Housing.

You refer to a project, Archer Courts Apartments, owned by the Chicago Housing Authority (CHA), awaiting a commitment for FHA insurance. We understand, based on April 15 and 19, 1999 e:mail from Mr. Strobel, that the project mortgage would be insured under section 221(d)(4) of the National Housing Act (NHA). Your memorandum expresses a concern about a Use Agreement to preserve the property as affordable housing for 99 years, which Use Agreement CHA wants to record before the FHA insured mortgage. The e:mail, dated April 19, 1999 describes the Use Agreement as requiring that the owner rent 145 units only to very low income tenants to the extent the units are assisted by section 8 or "other comparable housing assistance," and that the owner must renew any section 8 assistance if offered. It also requires across-the-board (regardless of assistance) that units be rented to very low or low or moderate income tenants.

In conversations with Mr. Strobel, Mr. Belin of my staff indicated that section 221 of the NHA requires that the HUD-insured mortgage must have a first lien as is

commonly given under the laws of the State in which the project is located. In that regard, section 221(c) provides that as used in section 221, "the terms 'mortgage', 'first mortgage', 'mortgagee', 'mortgagor', 'maturity date' and 'State' shall have the same meaning as in section 201 of this Act." Section 201 of the NHA defines "mortgage" to mean "a first mortgage on real estate in fee simple, or on a leasehold" The term "first mortgage" means "such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located, together with the credit instrument, if any, secured thereby." (Emphasis added). See also 24 CFR 200.80. Generally, if the proposed use agreement is not secured by the project that is security for the FHA-insured mortgage, and there is no right of foreclosure on the project mortgage for violations of the agreement, the use agreement would not appear to rise to the level of a lien (although state law might affect that issue). Even if a use agreement does not create a lien, but merely an encumbrance, under a particular state law, such an encumbrance might be viewed as affecting whether the insured mortgage is a first lien as is commonly given.

As Mr. Belin has previously noted to Mr. Strobel, whether, with the proposed use agreement, the HUD-insured mortgagee would have a first mortgage as is commonly given, is a matter that needs to be determined by your Office based on the laws of the state in which the real estate is located. HUD lacks statutory authority to proceed to endorse the note of a section 221(d)(4) mortgage if the HUD-insured mortgagee does not have the required first lien. Also, Mr. Belin did suggest that your office touch base with our New York Counsel's office, as that Office has had to consider a proposed use agreement in connection with the Stuyvesant project (a proposed mixed finance transaction) and was looking at the first lien issue. Their experience with it may be helpful to you.

If you have any questions about this matter, please contact Mel Belin, who can be reached at 202-708-4090 (ext. 5254).