



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410-0500

OFFICE OF GENERAL COUNSEL

Legal Opinion: CIM-0125

Index Number: 4.500

Subject: Authority to Pay for Development Services Under DEMO/DISPO Program

May 17, 2002

MEMORANDUM FOR: Frederick Tombar III, Acting Deputy Assistant Secretary  
for Multifamily Housing Programs, HTC

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

SUBJECT: MassHousing Demonstration Disposition Program  
Development Fee

This memorandum responds to your May 1, 2002 request for legal advice about whether HUD has legal authority to pay a development fee out of the General Insurance Fund to resident boards for services rendered by them on projects in the Demonstration Disposition Program (“Demo/Dispo Program”) in Boston, MA which is the subject of a contract between HUD and MassHousing (formerly known as the Massachusetts Housing Finance Agency). As discussed more fully below, we think that the activities of the resident boards, as described in your May 1 memorandum, that are provided to HUD through MassHousing are activities authorized pursuant to the statutes described below. We defer to the FHA’s Comptroller’s Office for a determination about the source and the availability of funds for payment by HUD for these services.

Authority for the Demo/Dispo Program can be found in Section 501 of the Housing and Urban Development Act of 1970 (“HUD Act of 1970”) which provides that the Secretary “is authorized and directed to undertake such programs of research, studies, testing, and demonstration relating to the missions and programs of the Department as he determines to be necessary and appropriate.” Pursuant to Section 501(e), the Secretary is authorized to carry out the functions authorized in Section 501 by contract, and the contract may be between the Secretary and State or local governments pursuant to Section 501(f). Section 7(i) of the Department of Housing and Urban Development Act (“HUD Act”) provides that:

. . . the Secretary is authorized to—

(1) foreclose on any property . . . . In the event of any such acquisition, the Secretary may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of

real property by the United States, complete, administer, remodel and convert, dispose of lease, and otherwise deal with, such property . . . .

Section 207(l) of the National Housing Act (“NHA”) provides, in part:

Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Secretary shall also have power, for the protection of the interests of the General Insurance Fund, to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contract for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, any property acquired by him under this section . . . . (Emphasis added)

Additional authority is provided in Section 203(c)(2) of the Housing and Community Development Amendments of 1978 (“HCDA of 1978”) which states:

(D) COMMUNITY AND TENANT INPUT.—In carrying out this section [203], the Secretary shall develop procedures—

(i) to obtain appropriate and timely input into disposition plans from officials of the unit of general local government affected, the community in which the project is situated, and the tenants of the project; and

(ii) to facilitate, where feasible and appropriate, the sale of multifamily housing projects to existing tenant organizations with demonstrated capacity, to public or nonprofit entities that represent or are affiliated with existing tenant organizations, or to other public or nonprofit entities. (Emphasis added)

(E) TECHNICAL ASSISTANCE.—To carry out the procedures developed under subparagraph (D), the Secretary may provide technical assistance, directly or indirectly, and may use amounts available for technical assistance under the Emergency Low Income Housing Preservation Act of 1987 [“ELIHPA”], subtitle C of the Low Income Housing Preservation and Resident Homeownership Act of 1990 [“LIHPRHA”], subtitle B of title IV of the Cranston-Gonzalez National Affordable Housing Act [“HOPE 2”], or this section, for the provision of technical assistance under this paragraph. Recipients of technical assistance funding under the provisions referred to in this subparagraph shall be permitted to provide technical assistance to the extent of such funding under any of such provisions or under this subparagraph, notwithstanding the source of the funding.

There is authority under Section 203(k)(6) of the HCDA of 1978 which states:

**PROJECT SALE DEMONSTRATION.**— The Secretary may carry out a demonstration to test the feasibility of disposing of troubled multifamily housing projects that are owned by the Secretary through the establishment of partnerships with public, private, and nonprofit entities.

Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, (“FY 1997 Appropriations Act) provides:

**FLEXIBLE AUTHORITY FOR MULTIFAMILY PROJECTS.**—During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary, including, for fiscal years 1997, 1998, 1999, 2000, and thereafter, the provision of grants and loans from the General Insurance Fund (12 U.S.C. 1735c) for the necessary costs of rehabilitation, demolition, or construction on the properties (which shall be eligible whether vacant or occupied), and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law. (Emphasis added)

A key point is that the Demo/Dispo Program involves a unique set of goals and procedures. A notice appeared in the Federal Register on September 16, 1993 at 58 FR 48528 to announce the demonstration under the authority in Section 501 of the HUD Act of 1970. The notice stated that the Demo/Dispo Program was designed “for the purpose of developing innovative methods for disposing of HUD-owned multifamily projects” through agreements between HUD and State housing finance agencies (“SHFAs”). The notice also stated that:

The demonstration program is designed to afford the SHFAs broad latitude in handling the proposed inventory;

The Department wants to encourage the use of innovative techniques under this demonstration; and

Possibly, SHFAs will engage in subcontracting in conjunction with management and sales responsibilities.

Therefore, the Demo/Dispo Program specifically contemplated the use of innovative techniques that otherwise might not be authorized.

To carry out the demonstration, HUD entered into a contract on April 11, 1994 with MassHousing for the management and the disposition of multifamily properties in the Demo/Dispo Program. Section 3.3 of the contract requires that MassHousing submit development budgets for each project and provides a procedure for HUD to review and approve the development budgets. Your memorandum indicated that HUD has approved the development budget submitted by MassHousing for each project in the Demo/Dispo Program, including the payment of development fees to resident boards. Your memorandum also

identified the types of services rendered by resident boards, including construction oversight, contracting and procurement, tenant relocation, contract administration, and the organization and formation of purchaser entities.

The sales of several projects in the Demo/Dispo Program are scheduled to close in the next few months.<sup>1</sup> The development fees would be paid to resident boards at the time of sale. As indicated in your memorandum, we think the Office of Housing should ensure that MassHousing certifies to HUD about the type and the cost of the services provided to HUD by MassHousing through its subcontract with a resident board and that the Office of Housing approves a voucher submitted by MassHousing for these services before making funds available to pay MassHousing for these services. Mass Housing then would be responsible for making payments pursuant to its subcontract with a resident board.

The statute provisions described above (i.e., Section 501 of the HUD Act of 1970, Section 7(i) of the HUD Act, NHA Section 207(l), Section 203(c) of the HCDA of 1978, and Section 204(a) of the FY 1997 Appropriations Act) authorize HUD to carry out, or enter into agreements with other parties or entities (e.g., MassHousing) to carry out, the development activities that are described in your memorandum.<sup>2</sup> For a determination about the appropriate source and the availability of funds for payment of development fees described in vouchers from MassHousing that have been approved by HUD, you should consult with the FHA Comptroller's Office. Although unlikely, there may be some funds available from appropriations, if any, under Section 501 of the HUD Act of 1970 or under one of the authorities cited in Section 203(c)(2)(E) of the HCDA of 1978. The NHA provides an alternative source of funds. As indicated above, NHA Section 207(l) provides that "the Secretary shall also have the power . . . to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with . . . or sell for cash or credit . . . any property acquired by him under this section . . . ."<sup>3</sup> We understand that the projects in the Demo/Dispo Program were acquired by HUD under NHA Section 207. Use of funds from the General Insurance Fund ("GIF"), however, is subject to requirements in NHA Section 1 which provides, in part, that:

. . . notwithstanding any other provisions of law except provisions of law

---

<sup>1</sup> We have not received information that we have requested about projects in the Demo/Dispo Program. See May 10, 2002 memorandum from the General Counsel (copy attached). As soon as possible, send us written information on each project about what remains to be done (by whom and when) and your anticipated closing dates so OGC can make necessary preparation to provide legal support for these activities. This information should be updated for us each month.

<sup>2</sup> Your memorandum described resident boards as having consulted, or contracted, with attorneys concerning oversight of the construction phase as well as development related services. Your memorandum also stated that HUD will not approve any voucher submitted by MassHousing for a development fee that includes any resident board attorney fees. We agree with this statement because the approval of the General Counsel must be obtained prior to any procurement of legal services to be provided by a private attorney. We are not aware that such approval has been given.

<sup>3</sup> We note that the authority in Section 207(l) applies to projects under the Special Risk Insurance Fund ("SRIF") pursuant to NHA Section 238(a)(2).

hereafter enacted expressly in limitation hereof, all expenses of the Department of Housing and Urban Development in connection with the examination and insurance of loans or investments under any title of this Act, all properly capitalized expenditures, and other necessary expenses not attributable to general overhead in accordance with generally accepted accounting principles shall be considered nonadministrative and payable from funds made available by this Act, . . . . Except with respect to title III, for the purposes of this section, the term “nonadministrative” shall not include contract expenses that are not capitalized or routinely deducted from the proceeds of sales, and such expenses shall not be payable from funds made available by this Act.

In other words, a contract expense must be deductible from sale proceeds or a capitalized expenditure in order for payment of that expense to be made from an FHA insurance such as the GIF or SRIF. If a contract expense described in NHA Section 1 does not satisfy this test, an alternative source of funds for payment of the expenditure would be from the annual appropriation for “administrative contract expenses” necessary to carry out programs under the GIF and the SRIF. A determination about whether an expenditure for the services described in your memorandum are deductible from sale proceeds or capitalized expenditures requires expertise that can be provided by the FHA Comptroller’s Office; consequently, we refer you to that office for such a determination.

The legal advice in this memorandum is limited to the facts presented in your May 1 memorandum and to the unique circumstances of the Demo/Dispo Program. This legal advice also is subject to revision in the event of any changes to applicable statutes or regulations. Please contact Michael Collotta at ext. 5249 or Monica Jordan at ext. 5244 if you have any questions or desire further assistance.

Attachment

cc:

Weidenfeller 10110  
Daly 9226  
Potts 9230  
Collotta 9230  
Jordan 9230  
Culpepper 1AC

Collotta 05/10/2002

H:\GIM\Tombar memo.Doc

REVISED:JJDaly:jjd 05/16/2002 202-708-1274

H:\GIM\Tombar memo-Revised.Doc

REVISED:JJDaly:jjd 05/17/2002 202-708-1274

H:\GIM\Tombar memo-Revised-Two.Doc

CONCUR:

---

Jordan

---

Potts

---

Collotta