

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
Washington, D. C.

In the Matter of:

WILLIAM A. THOMAS, et al.

Respondents

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HUDBCA No. 89-4289-D9
Docket No. 88-1308-DB

For the Respondents:

Alfred C. Moran, Esq.
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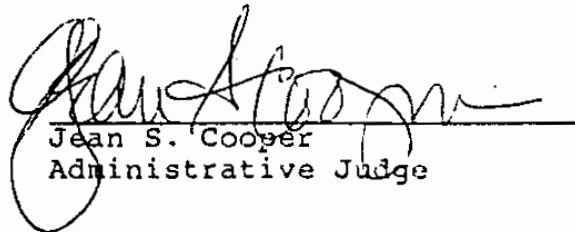
For the Government:

Andrea Q. Bernardo, Esq.
Dona Bland, Esq.
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

DECISION AND ORDER

The decision and order issued from the bench in this case pursuant to 24 C.F.R. §26.24(d) on May 11, 1989 is incorporated by reference in this Decision and Order. A copy of the transcription of the decision is attached. The parties shall have 15 days from receipt of this Decision and Order to request Secretarial Review.

ORDERED this 25th day of May, 1989.



Jean S. Cooper
Administrative Judge

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ORDER ON ERRATA

The following corrections of typographical errors and syntax shall be incorporated into the transcript of the Decision and Order issued from the bench in this case:

Page 529, line 9 - Insert "a" after "by"
Page 530, line 2 - "Thomas" not "Thoams"
Page 530, line 5 - "Bank" not "bank"
Page 531, line 8 - Joyce Haile Selassie" not "Haileselassie"
Page 531, line 11 - "partnership" not "partnerhips"
Page 534, line 6 - "bank", not "Bank"
Page 534, line 7 - "writing" not "writing"
Page 535, line 19 - "Section 305(b)" not "24.305"
Page 538, line 11 - "Administrative" not "Adinistrative"
Page 538, line 17 - "receive" not "received"

ORDERED this 25th day of May, 1989.



Jean S. Cooper
Administrative Judge

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT -
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:)
)
WILLIAM A. THOMAS, DRAKE PLAZA)
ASSOCIATES, DRAKE PLAZA LIMITED)
)
and) HUDBCA No. 89-4289-D9
)
W.A. THOMAS AND COMPANY, AFFILIATES) Docket No. 88-1308-DB
)
Respondent.)

BENCH DECISION

Federal Building
Courtroom C
1114 Market Street
St. Louis, Missouri

Wednesday
May 11, 1989

The hearing in the above-entitled matter commenced, pursuant to notice, at 2:00 p.m.

BEFORE: HONORABLE JEAN S. COOPER
Administrative Law Judge

APPEARANCES:

On behalf of the Government:

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On behalf of the Respondent:

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1 THE COURT: We will be on the record. I want to
2 say before I render my decision that I think Counsel for
3 both sides have done a fine job. Thank you, you went
4 through very, very extensive presentation of the case,
5 probably more extensive than necessary, considering my very
6 limited authority at a suspension hearing. But nonetheless,
7 I appreciate it and it certainly gave texture and form, and
8 I appreciate the professionalism that was shown at all
9 times. I just want everybody to know that.

10 MS. BERNARD: Thank you, your Honor.

11 MR. MORAN: Thank you, your Honor, thank you very
12 much.

13 THE COURT: I thank you.

14 Decision and Order in the Matter of William A.
15 Thomas, Drake Plaza Associates, Drake Plaza Limited, and
16 William A. Thomas & Company, HUD BCA No. 89-4289-DB [sic],
17 Docket No. 88-1308-DB.

18 DECISION AND ORDER

19 Statement of the Case

20 By letter dated November 8, 1988, William A.
21 Thomas was notified that the U.S. Department of Housing and
22 Urban Development had suspended him and his named
23 affiliates, Drake Plaza Associates, Drake Plaza Limited and
24 William A. Thomas & Company, Inc., pending the completion of
25 an investigation and any legal proceedings which may ensue

1 concerning suspected irregularities in the purchase and
2 managment of Drake Plaza Apartments, a HUD-FHA insured
3 multifamily housing project in St. Louis, Missouri. The
4 notice of suspension stated that Thomas and his affiliates
5 failed to make the HUD-required investment in the project,
6 misdirected mortgage proceeds to pay for non-mortgageable
7 items, and violated the project's Regulatory Agreement with
8 regard to the project's rent structure, which are causes for
9 suspension pursuant to 24 C.F.R. Sections 24.405(a)(2) and
10 24.305(b), (d) and (f). William A. Thomas made a timely
11 request for a hearing on the suspension. The Government
12 subsequently filed an amended Complaint, in which it dropped
13 the charge concerning project rents. This Decision and
14 Order is issued orally from the bench pursuant to 24 C.F.R.
15 Section 26.24(d).

16 Findings of Fact

17 1. William A. Thomas is a real estate appraiser,
18 developer and consultant who has wide experience with HUD
19 insured multifamily programs, including HUD's Section
20 221(d)(4) program. IN March 1985, Thomas was asked to
21 become involved in the development of the Drake Plaza
22 Apartments, a multifamily housing project for which a
23 conditional commitment of mortgage insurance had already
24 been obtained from HUD-FHA. The developers requested that
25 Thomas help obtain a firm commitment of the project so that

1 development could proceed. Thomas agreed to participate as
2 a general partner in exchange for a 1/3 partnership interest
3 in the project.

4 2. Drake Plaza Associates is a limited partnership,
5 in which Thomas is a general partner. He represented and
6 acted on behalf of the partnership during the development of
7 Drake Plaza. Thomas also owns William A. Thomas & Company
8 as a sole proprietor.

9 3. Drake Plaza was to be financed by HUD-FHA insured
10 mortgage in the amount of \$3,442,000 pursuant to Section
11 221(d)(4) of the National Housing Act, an Urban Development
12 Action Grant ("UDAG") of \$1,254,328, a Community Development
13 Agency ("CDA") loan of \$1,150,000 and a cash equity
14 investment of the partnership to be determined pursuant to
15 HUD guidelines.

16 4. HUD calculates the amount of cash equity that will
17 be needed to satisfy the investment requirement for a
18 Section 221(d)(4) mortgage insured by HUD. The HUD employee
19 who made these calculations was Dennis Worth. HUD had
20 issued a commitment for Drake Plaza but then a number of
21 amendments were required to reflect architectural and rental
22 structure changes. At various times, the calculations made
23 by Worth of the required cash equity investment differed.

24 5. The mortgagee prior to closing was Gershman
25 Investment. Gershman provided Thomas with a copy of

1 documents to be presented at closing sometime in November.
2 Thoams went over the documents and formed his understanding
3 of the financial obligations of the partnership from them.
4 Based on the copy of the mortgagee's certificate, which was
5 unexecuted at the time, and a Supplement to Project Analysis
6 prepared by Dennis Worth on November 20, 1986, Thomas formed
7 the belief that the partnership would have to make a
8 \$490,846 cash equity investment at closing. The Supplement
9 to Project Analysis is an estimate of costs only.

10 6. Subsequently, Worth prepared a Financial
11 Requirements for Closing form, dated December 24, 1986.
12 That form is intended to show the actual funds, not
13 estimates, that will be needed to close. It indicates that
14 \$2,960,043 would need to be invested as equity in cash or
15 equivalent by the partnership. That amount included the CDA
16 loan and UDAG grant. Subtracting the CDA and UADG funds, a
17 balance remained of \$555,715 as the required cash equity of
18 the partnership. Thomas did not see the Financial
19 Requirements form before closing. HUD sent it to the
20 mortgagee, Gershman Investment. No one from Gershman told
21 Thomas about the \$555,715 cash investment required before
22 closing.

23 7. The closing was held on December 30-31, 1986. In
24 an initial transaction, Gershman Investment transferred its
25 interest to the trustee of the bond issue, Mark Twain bank.

1 From that point, Mark Twain was the mortgagee of record.
2 Gershman Investment Corporation would remain at the closing
3 only to facilitate matters. Gershman became the servicing
4 agent after closing. Victor Zirilli represented Mark Twain
5 at the closing. Gershman had not secured an escrow agent or
6 opened an escrow account for the project. Thomas hired the
7 escrow company, Community Title, represented by Stewart
8 Kenney at the closing. Joyce Haileselassie was the closing
9 attorney for HUD.

10 8. Thomas came to the closing with checks written to
11 the partners or the partnerships, totalling more than
12 \$600,000 that he intended to use as the cash equity
13 investment, among other purposes. He also believed that the
14 partnership had been given a loan by Missouri State Bank for
15 \$400,000. That loan had been approved but not funded as of
16 December 31, 1986. The loan agreement required the deposit
17 of promissory notes before funding, and those promissory
18 notes had not been provided prior to the closing. The loan
19 was never funded.

20 9. At closing, Thomas signed a number of checks to be
21 drawn from the Drake Plaza Associates account. These checks
22 included \$376,481.50 in expenditures from cash equity that
23 had been approved by HUD on Draw 1, dated December 30, 1986.
24 The checks were all dated December 31, 1986. The funds to
25 pay the checks were deposited by Thomas in the Drake Plaza

1 Associates account immediately after the closing. There
2 were funds to pay these checks upon presentment.

3 10. The \$376,481.50 was the only cash equity
4 investment, as approved and defined by HUD, that was made at
5 the closing or before, by the partnership. It was less than
6 the required equity investment that Thomas believed had to
7 be made, and was even less than the final HUD calculated
8 figure of \$555,715.

9 11. The Mortgagee's Certificate had a change made in
10 handwriting at Paragraph 7 which altered the required cash
11 investment from \$490,846 to \$555,715. It is initialed
12 "V.Z." for Victor Zirilli. Zirilli testified in his
13 deposition that he had no recall of the change or who
14 directed it. However, Zirilli initialed the change and
15 executed the Mortgagee's Certificate on December 31, 1986.
16 No funds had been received from the partnership by Mark
17 Twain but Zirilli nonetheless certified that \$555,715 had
18 been deposited. HUD relied on the Mortgagee's
19 Certification. HUD also relied on the Mortgagor's
20 Certification signed by Thomas that he had read and complied
21 with the terms stated in the Mortgagee's Certificate.
22 Thomas' certification was not based on the amount inserted
23 in writing by Zirilli on December 31, 1986. Thomas had
24 executed his certificate on December 30, 1986, relying on
25 the unexecuted copy of the Mortgagor's Certificate that he

1 had been shown with the lower amount.

2 12. Stewart Kenney wrote the title insurance and
3 disbursed funds for Drake Plaza as the escrow agent. He
4 issued deeds and title for the land. He established an
5 escrow account. At the closing, Thomas gave him a check for
6 \$500,000 written on the partnership account. Thomas
7 intended it to cover land costs, not the required cash
8 equity investment. Kenney deposited the \$500,000 check and
9 a check for \$1,150,000 from the CDA loan into the escrow
10 account. Thomas directed him to disburse from the escrow
11 account three checks that covered land purchases in whole or
12 in part. These payments were not approved by HUD and could
13 not be made from the required cash equity investment. These
14 payments were \$250,000 to Liquidor Processo, Inc., \$155,000
15 to Para Liquidor, Inc. and \$95,000 to Lindell-Olive
16 Redevelopment Corporation, at least in part for land.
17 Thomas also directed Kenney to pay Gershman \$124,852 that
18 Gershman would transfer to Mark Twain for the bond reserve
19 account. The bond reserve account may not be paid out of
20 cash equity investment under HUD rules. Kenney made no
21 distinction between the \$500,000 check that Thomas gave him
22 and the CDA check. He considered them together as the
23 escrow funds. He wrote the checks, as directed.

24 13. The \$500,000 check was returned for insufficient
25 funds. Thomas testified that he was not aware the the

1 \$400,000 loan that Missouri Bank had approved had not been
2 funded. Thomas wrote the \$500,000 check against money he
3 believed would be deposited by Missouri State Bank when the
4 loan was funded. He believed it would be funded as of late
5 December 31, 1986 because he delivered the promissory notes
6 to the Bank that day. He did not verify the funding before
7 writing the check in question and was not told that the loan
8 had not been funded until sometime in January 1987. Equity
9 cash in the form of the CDA loan funds were, in fact, used
10 to pay the land cost checks, because of the returned check.

11 14. On March 5, 1987, Thomas directed Kenney to write
12 a check to Standard & Poors Corporation for \$7,500 to pay a
13 bond rating fee. A bond rating fee is not approved by HUD
14 for disbursement from cash equity and no approval was
15 received before the disbursement was made from the escrow
16 account.

17 15. On March 3, 1987, Thomas obtained a loan from
18 Housing America Corporation for \$400,000 which he deposited
19 in the escrow account to cover the returned check, at least
20 in part.

21 16. The UDAG funds did not begin to flow into the
22 escrow account until 14 months after the closing. The
23 escrow account had insufficient funds to meet the vendor's
24 approved charges by Draw 5, and there were no funds to meet
25 the approved charges by Draw 6. The contractor complained

1 to Thomas about not being paid. Thomas testified that he
2 was not aware of any shortfalls until July 1987.

3 17. By late 1987, the HUD St. Louis office determined
4 that the escrow account was underfunded by \$412,889.07,
5 exclusive of UDAG funds. That shortfall was subsequently
6 refunded by Thomas in, or near, its entirety by a letter of
7 credit and a loan from the general contractor.

8 18. Although HUD notified Mark Twain Bank in February
9 1989 that the requirements for final closing had been met,
10 the project has not gone to final closing.

11 19. At the present time, there is an ongoing
12 investigation of Thomas by the HUD Office of Inspector
13 General and the events surrounding the closing for Drake
14 Plaza.

15 DISCUSSION

16 The purpose of suspension is to protect the public
17 interest when there exists adequate evidence to suspect
18 commission of an offense listed in 24 C.F.R. Section 305(a)
19 or that a cause for debarment exists under Section 24.305.
20 A suspension is for a temporary period pending completion of
21 an investigation and such legal, debarment or Program Civil
22 Fraud Remedies Act proceedings as may ensue.

23 I find that the Government has established by
24 adequate evidence that there is reason to suspect that a
25 cause for debarment may exist because Thomas knowingly

1 violated the requirements for a cash equity investment in
2 the Section 221(d)(4) program. This would be a ground for
3 debarment under 24 C.F.R. Section 24.305(b)(1) and (3), and
4 (d). I find that he knew that he had not made the
5 investment he believed he had to make, even if he was
6 unaware of the increase that HUD had calculated.
7 \$376,481.50 is simply less than either amount. It is not
8 even close. If I credit Thomas' testimony that the \$500,000
9 check was to pay for land, this only further solidifies my
10 conclusion. I do not credit any claim of confusion based on
11 the entry at the mortgagee's block on Draw 1. Thomas is
12 very experienced in HUD programs, is very familiar with the
13 draw form. He knew that HUD required a 10 percent
14 investment including the CDA and UDAG funds. He knew that
15 \$376,481.50 did not equal this required amount. He had a
16 duty to tender the money at the closing. The entire
17 procedure contemplates deposit at closing. Making it three
18 months later when there are already shortfalls is not
19 responsible. Thomas made no inquires of the mortgagee, of
20 the escrow agent or of HUD to resolve his alleged confusion.
21 No one asked for the money, so he didn't pay it. The
22 shortfalls experienced later were due in part to initial
23 underfunding of which Thomas was aware at all times, namely
24 the failure to pay in more than \$376,481.50. The shortfall
25 was exacerbated by the misadventures with the unfunded loan

1 and the extreme delay in UDAG funding.


2 Thomas also directed Kenney to make the payment to
3 Standard & Poors and to Gershman out of escrow funds. Both
4 of these were not expenditures that were to be made from
5 mortgage proceeds or equity cash investment. Thomas knew or
6 should have known this. He violated HUD rules and
7 directives by directing Kenney to pay these fees out of the
8 escrow account.

9 I credit Thomas' statement that he didn't know the
10 Missouri Bank had not funded the loan when he wrote a check
11 for \$500,000 to the escrow account. Nonetheless, he has a
12 duty of caution and responsibility that would have required
13 him to verify funding before writing the check. This is not
14 responsible conduct to simply trust without verification,
15 particularly since he knew the funds could not be placed in
16 the account until the promissory notes were accepted. The
17 result was that impermissible payments were made from the
18 CDA funds in the escrow account to cover land costs. This
19 result may not have been intended by Thomas, but he is
20 nonetheless responsible for it.

21 I find that the Government has carried its burden
22 of proof in regard to the two charges: failure to satisfy
23 HUD's requirement for a minimum investment and directing
24 unauthorized draws from the project escrow account to pay
25 for items not eligible for payment from mortgage proceeds or

1 the cash equity investment under HUD rules and regulations.
2 Both of these acts were done knowingly and, therefore I
3 conclude, willfully, at least as to the minimum investment,
4 and payment of Gershman and Standard & Poors. I do not
5 agree that these violations are not material. They are.
6 They abused the mortgage process. Therefore, the suspension
7 was properly imposed based on adequate evidence and shall
8 remain in effect, accordingly.

9 ORDERED this 11th day of May, 1988.

10 Jean S. Cooper  5/25/88
11 Chairman and Administrative
12 Judge

13 HUD Board of Contract Appeals
14

15 Parties have 15 days from receipt of the decision
16 to request Secretarial Review. Receipt will date from when
17 the parties received my order adopting this decision with a
18 copy of it attached.

19 We will be in adjournment.
20