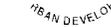


U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-8000

 ASSISTANT SECRETARY FOR HOUSING-  
FEDERAL HOUSING COMMISSIONER

February 17, 2010

MORTGAGEE LETTER 2010-06

TO: All FHA-Approved Multifamily Mortgagees

SUBJECT: Extension of Mortgage Letter 2009-22 Revised Temporary Authority for Multifamily Hubs to Process Waiver Requests Pertaining to the Three-Year Rule for Section 223(f)

**Purpose**

The temporary authority established by Mortgage Letter (ML) 2009-22 published on July 29, 2009, and scheduled to expire on January 29, 2010, allows Multifamily Hubs to process waiver requests pertaining to the Three-Year Rule for Section 223(f) applications. The Department is extending the provisions of ML 2009-22 for one year from the publication date of this letter. The extension authority is still needed because of the continuing irregular availability of credit.

All of the requirements for Section 223(f) Three-Year Rule waiver approval enunciated in ML 2009-22 remain unchanged and are republished in this Mortgage Letter except for a clarification made to waiver authority Condition 5, which now clarifies what parties sign the certification attesting to the difficulties in obtaining credit without the commitment of FHA insurance. The Department will evaluate the effectiveness of this waiver authority based upon applications received and may elect to further extend the program based upon that evaluation. This Mortgage Letter supersedes and replaces ML 2009-22.

This ML sets forth the Department's policy to grant temporary authority to Multifamily Hub Directors to waive the Three-Year Rule for Section 223(f) applications, for the purpose of providing liquidity to recently constructed or substantially rehabilitated, self-sustaining properties that are unable to secure permanent long term financing due to the freeze in the capital markets. This ML will benefit applications that meet all of the qualifications of the Section 223(f) program, except for the fact that the property was originally constructed or substantially rehabilitated less than three years prior to the date of application for Firm Commitment. Eligible recently constructed property applications will have a Certificate of Occupancy (CO) dated no later than the date of the application. This ML does not apply to projects that are three or more years old that have had only minor and/or cosmetic repairs less than three years ago, since these projects would qualify for processing under our existing Section 223(f) requirements.

## **Background**

A number of fully operating, self-sustaining properties, which have recently been constructed or substantially rehabilitated, are still unable to secure permanent long-term financing due to the freeze in the capital markets. At this time, the Department recognizes the need to continue to provide liquidity to the market place. In order to do so, waiver authority of the Section 223(f) eligibility restriction to properties that have been completed or substantially rehabilitated for three years prior to the date of application is required.

Historically, Section 223(f) program requirements have been temporarily modified to better meet program goals when economic conditions greatly decreased the availability of credit. When the Section 223(f) Handbook was originally published, it set forth a Special Eligibility Program that was applicable to recently completed projects, whose construction was started before June 30, 1974, and completed before the end of 1975. This special program was implemented to address liquidity shortages prevailing in multifamily real estate financing at that time that prevented otherwise sound projects from obtaining permanent financing. The existing capital market credit freeze is similarly constraining the availability of permanent financing today. This ML provides relief similar to that provided in 1974, but also includes additional requirements to ensure that the properties are viable, self sustaining and will not jeopardize the long term financial stability of the Section 223(f) program.

## **Waiver Authority**

As of the date of this ML, Hub Directors will have temporary authority to waive the Three-Year Rule for the Section 223(f) program for a one year period subject to the conditions and processing instructions below. The requirements of this ML may not be waived by Hub Directors.

## **Conditions**

1. This waiver authority applies only to conventionally financed apartment projects that were originally constructed or substantially rehabilitated less than three years prior to the date of application for Firm Commitment and in cases of new construction, have a CO for the entire project dated no later than the date of the application. For projects that were constructed in phases and have more than one CO, refer to the date of the most recent CO. Only apartment projects are eligible under this waiver authority. Any project that falls under the Section 232 program is ineligible.
2. Any prepayment restriction associated with the new Section 223(f) financing must be discussed with the applicant.
3. The final mortgage amount shall only be sufficient to pay off existing indebtedness, and may not include an equity payment to the Owner. Existing indebtedness is defined as project debt that is over one year old. Recently incurred debt (less than one year) is ineligible. Evidence that the debt is project related must be submitted with the application.

4. All other applicable program requirements for the Section 223(f) program must be met, including compliance with applicable civil rights laws, including the nondiscrimination and affirmatively furthering fair housing provisions of the Fair Housing Act, and applicable accessibility requirement for persons with disabilities (see 24 CFR 5.105(a) for a listing of federal civil rights requirements).
5. The applicant must submit documentation evidencing that efforts to obtain permanent conventional financing have been unsuccessful, or that current offers of conventional financing have been cancelled. This documentation should include rejection letters from prospective Lenders or cancellation letters from Lenders that had previously committed financing. Acceptable documentation may also include a certification signed by both the Borrower and the FHA Lender that credit is not available at reasonable rates and terms without the commitment of the FHA Insurance.
6. The applicant must submit evidence that all interest and/or debt service payments have been made on time since the beginning of the current loan.
7. The submission of financial statements for the project is required. A Certified Public Accountant (CPA) or Independent Public Accountant (IPA) should audit the latest year's financial statements, however, if audited statements are not available an Owner-certified statement for the latest year or period of operation, may be accepted. This policy is only applicable to applications submitted under the temporary authority provided by this ML. The Lender must state why audited statements are not available. Any Owner-certified financial statement or Owner-certified balance sheet and operating statement or CPA or IPA audited financial statements must contain at a minimum the Criminal Warning and Certification information contained on Form HUD-92417. A substitute statement must contain the following certification and criminal warning:

"I HEREBY CERTIFY that the foregoing figures and statements contained herein submitted by me as agent of the Mortgagor [Owner] for the purpose of obtaining mortgage insurance under the National Housing Act are true and give a correct showing of \_\_\_\_\_'s (Name of Mortgagor or Owner) financial position as of \_\_\_\_\_(date of financial statement). Signed this \_\_\_\_ day of \_\_\_\_, 20\_\_\_. Signature of authorized agent with name printed or typed under signature \_\_\_\_\_.

Warning – HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802).

8. Occupancy. Projects must meet both a Sustaining Occupancy requirement and a 90% Certified Rent Roll requirement prior to Initial/Final Endorsement. These requirements apply to both newly constructed and substantially rehabilitated projects.
  - a. Sustaining Occupancy is defined as having sufficient income to pay all operating expenses, monthly debt service, escrow and reserve for replacement requirements for three consecutive months. Applications may be submitted prior to the project achieving Sustaining Occupancy. However, the project must achieve Sustaining

Occupancy for a period of three consecutive months immediately prior to the date of Initial/Final Endorsement. In these cases, achievement of Sustaining Occupancy must be included as a Firm Commitment condition. Commitments containing this condition may not be extended if the condition is not satisfied within the original commitment term.

- b. In addition, the Certified Rent Roll level of occupancy must be 90% for all units in the entire project, including all phases, for a period of three consecutive months immediately prior to Initial/Final Endorsement. Rent concessions, other discounts and short-term leases (less than 12 months) that are offered by a landlord to induce a prospective tenant to enter into a lease must be taken into consideration when evaluating the credibility of the 90% occupancy requirement. The market analysis contained in the appraisal report, or market study, if required, should include a discussion of any rent concessions and lease terms in relation to concessions employed by competing projects and must justify any processing occupancy rate that exceeds the Certified Rent Roll Occupancy level. All construction or substantial rehabilitation must have been completed prior to submission of an application for Firm Commitment. Construction completion must be evidenced by a CO by the applicable local authority. It is recognized that some substantial rehabilitation cases are completed while the project is occupied and that CO may not be applicable. Other evidence of the completion of work are acceptable (i.e. local inspections or certifications) at the discretion of the processing office.
9. No waiver of the requirement for submission of “as-built” plans shall be permitted for new construction cases. For substantial rehabilitation, plans or other construction documents that are relative to the type of work completed should be submitted.
10. As per outstanding requirements, a current Phase I Environmental Assessment must be submitted. It should reference any prior Environmental Assessments and these older reports should be submitted if available. Environmental processing must be completed in accordance with the current requirements.
11. In accordance with the Uniform Standards of Professional Appraisal Practice, the appraisal report should discuss any current listing of the subject and any offers made and/or accepted to purchase, lease or option the project. Also, since these projects are recently constructed or rehabilitated, depreciation will be minimal or significantly reduced, contributing to the reliability of the Cost Approach. Processing offices are reminded that this approach is required and should be considered in the reconciliation process.
12. Copies of any market studies and updates that were made in conjunction with obtaining the current loan must be submitted. Projects that have achieved Sustaining Occupancy and the 90% Certified Rent Roll Occupancy requirement prior to Firm Commitment submission, may submit the market analysis in the appraisal report so long as it addresses the current market conditions of the subject property, including a discussion of long term demand for rental housing based on, but not limited to, local demographics, employment, schools, shopping, transportation and other neighborhood amenities. Applications that have not achieved Sustaining Occupancy and met

the 90% Certified Rent Roll Occupancy requirement prior to Firm Commitment submission must include a Market Study completed in accordance with outstanding processing guidance.

13. Inspections/Repairs. All of the existing requirements related to project inspection, repair escrows, and protection against latent defects associated with the new Section 223(f) financing are applicable to cases processed under this waiver authority. In addition, the following requirements apply:
  - a. Any latent defects that became apparent during the warranty period provided under the project's original construction contract, whether repaired or not, must be disclosed at the time of application.
  - b. The Project Capital Need Assessment shall assess the adequacy of the repairs performed to address any latent defects and determine whether any additional repairs are required to correct the defects, and shall establish a cost to complete the repairs.
  - c. All repairs required under this category, whether critical or non-critical, must be performed prior to closing and may not be included in the mortgage.

If there are any questions regarding the action taken on this waiver request, please contact Daniel J. Sullivan, Director of the Policy Division at (202) 402-6130 or Joseph A. Sealey, Director of the Technical Support Division at (202) 402-2559, Headquarters Office of Multifamily Development.

Sincerely,

David H. Stevens  
Assistant Secretary for Housing –  
Federal Housing Commissioner