

U.S. Department of Housing and Urban Development

H O U S I N G

4350.6  
APPENDIX 2-1

Special Attention of: Notice H 91-57 (HUD)

Administrators-Regional  
Housing Commissioners Issued: 6/27/91  
Directors, Office of Regional Housing Expires: 6/30/92  
Managers, Division Directors, Loan  
Management Category A, B, and C Offices Cross References:  
Field office Housing Management  
Division; Regional Counsel,  
Chief Counsel and Chief Attorneys

Subject: Restrictions on the Sale of Subsidized Rental  
Housing Imposed by Section 181(g) of the Housing  
and Community Development Act of 1987

The purpose of this Notice is to discuss the applicability and requirements of Section 203(h)(2) of the Housing and Community Development Amendments of 1978, as amended by Section 181(g) of the Housing and Community Development Act of 1987. This Notice amends the TPA processing instructions in Notice 84-37. Section 203 of the 1978 Amendments sets forth the goals and requirements applicable to the management and disposition of HUD-owned multifamily rental projects. Section 181 of the 1987 Act expands Section 203's applicability to include projects with HUD-held mortgages that are "delinquent, under a workout agreement or being foreclosed upon by the Secretary." In addition, Section 181(g) adds requirements governing the sale of HUD-held subsidized mortgages and transfers of physical assets (TPAs) of subsidized projects. With respect to transfers of physical assets, Section 203(h)(2) provides as follows:

- (2) The Secretary may not approve the sale of any subsidized project (A) that is subject to a mortgage held by the Secretary; or (B) if the sale transaction involves the provision of any additional subsidy funds by the Secretary or the recasting of the mortgage, unless such sale is made as part of a transaction that will ensure that such project will continue to operate at least until the maturity date of the loan or mortgage in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the proposed sale of the project.

transfer of ownership. The Office of General Counsel has concluded that the restrictions set forth in Section 203(h)(2) apply to TPAs requiring either a modified or full review. The phrase "the provision of any additional subsidy funds by the Secretary" includes, but is not limited to, an increase in the number of units under a Section 8 HAP Contract and an increase in the Section 8 contract rents based on rent increases approved in connection with the TPA. For purposes of this Notice, the term "recasting" means any mortgaged indebtedness modification which entails a change in the principal amount, interest rate, monthly mortgage payment, or maturity date.

Projects subject to Section 203(h)(2). The definition of "subsidized project" is set forth in Section 203(i)(2) of the 1978 Amendments, as amended by Section 181(h) of the 1987 Act and Section 1010(d) of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Under this definition, the term "subsidized project," for purposes of Section 203(h)(2), includes a project receiving any of the following forms of assistance:

- (1) a Section 221(d)(3) BMIR loan;
- (2) Section 236 Interest Reduction Payments;
- (3) Rent Supplement assistance;
- (4) the Section 202 or Section 312 programs; or
- (5) project-based assistance under Section 23 or Section 8 regardless of the number of units assisted. (Examples: A project sold by HUD with a purchase money mortgage and Section 8 Property Disposition Set-Aside assistance, or a Section 221(d)(3) market rate project with Section 8 Loan Management Set-Aside assistance.)

With respect to the TPA approval requirements of Section 203(h)(2), a project is considered "subsidized" even if the only subsidy is Section 8 project-based assistance covering less than 50 percent of the units.

Restrictions imposed pursuant to Section 203(h)(2). In cases where Section 203(h)(2) is applicable, HUD must condition its approval of the TPA on the purchaser's agreement to extend the prepayment prohibition to the maturity date of the mortgage or execute a use agreement to maintain the project in accordance with the tenant-related provisions of the applicable mortgage insurance program until the maturity date of the mortgage. The nature of the restriction required by Section 203(h)(2) is determined by the "program under which the loan or mortgage was made or insured," and not by the requirements of the Section 8 program. Thus, for example, if the project's mortgage was insured under the Section 221(d)(4) program and the owner and HUD

agree to comply with Section 203(h)(2) through the execution of a use agreement, the agreement would include only those tenant protections (e.g., maintenance of rental use) which are derived

from the Section 221(d)(4) program requirements.

Implementation. Upon receiving an application for TPA approval, the field office should take the following steps in order to implement Section 203(h)(2):

1. Determine whether the project is a "subsidized project" for purpose of Section 203(h)(2), and if so, whether (a) the mortgage is HUD-held, or (b) the sale transaction involves the provision of any additional subsidy funds by the Secretary or a recasting of the mortgage.
2. If the project is a subsidized project for purposes of Section 203(h)(2), and either (a) the mortgage is HUD-held or (b) the sale transaction involves the provision of any additional subsidy funds by the Secretary or a recasting of the mortgage, notify the applicant that the purchaser will have to comply with Section 203(h)(2), and inquire whether the purchaser intends to meet this requirement by extension of the prepayment prohibition until the maturity date of the mortgage or by execution and recordation of a use agreement that would have priority over all liens and encumbrances other than the HUD mortgage (except as approved by HUD). The use agreement would not have priority over liens and encumbrances placed on the property prior to the TPA and approved by HUD, but would have priority over liens and encumbrances imposed in connection with the TPA. The use agreement would be enforceable by HUD as well as tenants and potential tenants, and would continue in effect until the maturity date of the mortgage.
3. If the purchaser elects to comply with Section 203(h)(2) by extending the prepayment prohibition, the field office should execute a Modification of Note and Mortgage to effect such an extension at the time of TPA approval. For TPAs involving HUD insured mortgages, the mortgagor must obtain consent of the mortgagee to extend the prepayment prohibition, and the mortgagee and mortgager, as well as HUD, must execute the Modification of Note and Mortgage. For TPAs involving HUD-held mortgages, the Modification is executed by the mortgager and HUD. Prior to execution of the Modification, the mortgagor must obtain a sample title insurance policy endorsement from the title insurance company and submit it to HUD for review. Once the Modification has been executed it should be recorded,

and Field Counsel should obtain, at the mortgagor's

expense, a title endorsement updating to the date of recordation the effective date of the title policy without adding any senior liens or other senior encumbrances (except as approved by HUD). Should the mortgagee withhold consent of the modification of the mortgage or mortgage note, the owner must execute a use agreement as described in the following paragraph.

4. If the purchaser elects to comply with Section 203(h)(2) through the execution of a use agreement, Field Office staff should obtain a use agreement for the appropriate project type. The Office of the General Counsel's Multifamily Mortgage Division (Loan Management and Property Disposition Section) will be responsible for the development of these agreements, except in the case of Section 202 in which case the Office of General Counsel's Assisted Housing Division will be responsible for the development of a sample agreement. Sample use agreements for each type of project (221(d)(3), 236, 202, etc.) will be forwarded to Field Offices. Upon execution, the use agreement should be recorded. Field Counsel should ensure that the use agreement has priority over all liens other than the HUD mortgage (except as approved by HUD) and will continue in effect until the maturity date of the mortgage. See paragraph 2 above.

Finally, the effective date of these requirements is June 16, 1989. A memo dated June 16, 1989, from Donald Kaplan, Director, Office of multifamily Housing management, directed field offices not to accept, process or approve any TPA application for any subsidized project with a HUD-held mortgage, and to cease processing any TPAs that had already been submitted. Likewise, in the case of any TPA application involving a subsidized project with an insured mortgage in which the TPA included additional HUD assistance or the recasting of the mortgage, field offices were to inform owners that the TPA would be held by the field office until further instructions were received. Field Offices should not have given preliminary approval for any TPAs falling into these categories without first having secured a written agreement from the owner stating that the owners would continue to manage the project under its current program for the remaining term of the mortgage.

Field Office staff should review each TPA processed since the effective date, in order to determine whether Section 203(h)(2) is applicable to the TPA. In cases where Section 203(h)(2) is applicable and the Field Office obtained the written agreement described above from the owner, the Field Office Loan Management staff should write a certified letter to the owner of record at the address of record as soon as possible. This letter



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form HUD-9610(04/07/92)  
ref. Handbook 4350.6

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APPENDIX 2-2A

Instructions for Completing Form HUD-9610

NOTICE OF ELECTION TO PROCEED

1. Fill in the project's official name, with complete address
2. Fill in the address of the Local HUD Field Office which will be processing this Notice and the Plan of Action.
3. Fill in the FHA Project Number.
4. Fill in the submission date of this Notice.
5. a. Check this box if the election is for Title II incentives without going through the Title VI appraisal process.  
  
b. Check this box if the election is to proceed through the Title VI appraisal process before making the decision for either Title II or Title VI incentives.  
  
c. All owners submitting this form must check this box to certify that they are eligible for incentives under the Transition Rule.
6. Fill in the owner's full name and complete business address.
7. Owner must certify the truth of the above information with a signature and date in this box.

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