



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

OFFICE OF GENERAL COUNSEL

February 12, 2004

Index Number: 3.124 – Refinancing (Section 223(a)(7))
Subject: Request for Formal Opinion re: 223(a)(7) Lease Terms

CIM-0130

MEMORANDUM FOR: Carl Kao, Chief Counsel, 9DC

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

SUBJECT: Request for Formal Opinion re: 223(a)(7) Lease Terms

This memorandum responds to your June 18, 2003 request for a formal opinion on the issue of whether Section 223(a) of the National Housing Act (NHA) exempts projects refinanced under 223(a)(7) from the ten-year ground lease requirement of the original FHA mortgage insurance program.

Your memorandum states that Clark Senior Apartments is a 41-unit Section 221(d)(4)/223(a)(7) apartment building located in Los Angeles, California, and that during the closing package review, it was discovered that the proposed Section 223(a)(7) refinancing loan term extended beyond the original Section 221(d)(4) term to end of the ground lease term. After receiving an informal opinion from our office, Lender and Owner's counsel agreed to reduce the 223(a)(7) loan term to comply with the ten-year requirement and closing was completed.

It is our view that the 223(a)(7) loan is subject to the ground lease requirements of the original mortgage insurance program, in this case, Section 221(d)(4). Section 221(c) of the National Housing Act incorporates the definitions of Section 201 of the National Housing Act into the Section 221(d)(4) program. Section 201(a) defines "mortgage" as a "first mortgage on real estate in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than ten years to run beyond the maturity date of the mortgage...." 12 U.S.C. § 1707(a). These statutory definitions are referenced in the core eligibility requirements of Section 221.

Lender's counsel argued that depending on how broadly one defines "eligibility" under Section 223(a), it may be argued that Section 223 is exempt from the requirement of the original mortgage insurance program, i.e. Section 221(d)(4). Section 223(a) states in pertinent part that "[n]otwithstanding any of the provisions of this Act and without regard to limitations upon eligibility contained in any section or title of this Act...the Secretary is authorized upon application by the mortgagee, to insure or make commitments to insure under any section or title of this Act any

mortgage....” (emphasis added). 12 U.S.C. § 1715n (a). Neither the legislative history of Section 223(a) or case law provide any interpretative guidance. HUD’s regulations set forth at 24 CFR § 200.20, however, provide that “an existing insured mortgage may be refinanced pursuant to the provisions of section 223(a)(7) of the Act and such terms and conditions established by the Commissioner.” It is well settled that a federal agency’s interpretation of its own regulations is entitled to controlling weight and great deference. Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994). *See also* Chevron U.S.A. v. NRDC, 467 U.S. 831, 843; Gladstone Realtors v. Bellwood, 441 U.S. 91, 107 (1979); Udall v. Tallman, 380 U.S. 1, 16 (1965). The agency’s interpretation does not have to be the only possible interpretation, but merely a permissible one. In light of HUD’s core statutory definitions and requirements, it is our view that the leasehold requirements in Section 201(a) are fundamental “terms and conditions” to the mortgage insurance program, and therefore, not encompassed by the “notwithstanding” language concerning eligibility in section 223(a)(7). If the “notwithstanding” language of section 223(a) were to apply to the definitions provision of Section 201(a), then arguably this could eliminate some of the mortgage insurance program’s core statutory requirements, including the requirement that the mortgage be a first lien; lease requirements; and the definitions of “mortgagee,” “mortgagor” and “maturity date” (fundamental terms used in the eligibility requirements of Section 221 and other mortgage insurance programs). *See* 24 CFR § 200.71 (the project must be free and clear of all liens other than the insured mortgage and approved inferior liens) and 24 CFR § 207.251(c) “(the term ‘mortgage’ means such first lien upon real estate and other property as is commonly given...)”. Although the leasehold requirements are not included in the definitions section of HUD regulations, it is included within the statutory definition of the term “mortgage” under Section 201(a) and such definition is plain and unambiguous. Consequently, in this case, it was appropriate for the 223(a)(7) loan term to be reduced in order to comply with the statutory requirement that a ground lease term be at least ten years beyond the FHA loan term.

Please contact Koren McKenzie-John at 202-708-4090 if you have any further questions regarding this memorandum.

cc:

CIM: File/Chron 9228

CIM: Potts 9228

CI: Daly 9226

Decimal file 283.0 (Sec. 223(a)(7))

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