



U. S. Department of Housing and Urban Development
Washington, D.C. 20410

Office of Lead Hazard Control

POLICY GUIDANCE NUMBER: 98-02	DATE: August 10, 1998
SUBJECT:	Eligibility of certain publicly owned housing for assistance under Lead Hazard Control grants
STATUS:	Current
APPLICABILITY:	All grant rounds.
RELATED GUIDANCE:	
COMMENTS:	This provides an interpretation of the law which allows grantees to perform lead hazard control on certain publicly owned housing that will be transferred to the private sector.

Dear Lead-Based Paint Hazard Control Grantee:

I am writing to inform you of a recent opinion issued by the Department's Office of General Counsel (July 22, 1998 memo attached) which clarifies your ability to use the Lead Hazard Control grant funds to address family housing which is publicly owned (except for federally owned housing, federally assisted housing, or public housing) and scheduled to be sold to private owners.

The attached opinion permits grantees to undertake lead hazard control work while the units are in public ownership, before the sale or transfer, thus allowing an approach which is cost-effective and more protective of future residents. The fundamental criteria include:

- The unit assisted will transfer to private or non-profit ownership in a reasonable period of time following lead hazard control activities
- The units will comply with the residency, income, and child occupancy requirements of Section 1011 of Title X. This section is published in the current NOFA.

Please review the attached memorandum carefully. Should you have any questions, you may call me at (202) 755-1785 x 112.

Sincerely,

Ellis G. Goldman
Director, Program Management Division

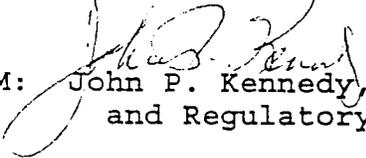


U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

JUL 22 1998

OFFICE OF GENERAL COUNSEL

MEMORANDUM FOR: David E. Jacobs, Director of the Office of Lead
Hazard Control, L

FROM:  John P. Kennedy, Associate General Counsel for Finance
and Regulatory Enforcement, CF

SUBJECT: Eligibility Under the Lead-Based Paint Grant Program

This memorandum responds to your request that the Office of General Counsel provide a legal opinion approving an interpretation of the Office of Lead Hazard Control (hereafter, "the Lead Office") concerning whether the City of Kankakee, Illinois, a grantee, may use lead-based paint grant funds to evaluate and reduce lead-based paint hazards for housing that is owned by a public agency, but is not federally owned housing, federally assisted housing or public housing. The housing which is the subject of this request is owned by the City of Kankakee and we understand that this housing does not receive federal assistance, including public housing modernization funds under the U.S. Housing Act of 1937, and therefore it is not public housing. The Lead Office's basic position is that the use of grant funds for this particular housing is appropriate. The Lead Office would also like to establish a policy that the City of Kankakee, and other similarly situated grantees, could only use lead-based paint grant funds for this housing if the housing was designated for sale to the private sector, as the housing is in this case. We have concluded that these positions are supportable and would likely be upheld by a reviewing court.

I. Legal Analysis.

Section 1011(a) of Title X of the Housing and Community Development Act of 1992 (42 U.S.C. 4852(a)) authorizes the Secretary "to provide grants to eligible applicants to evaluate and reduce lead-based paint hazards in housing that is not federally assisted housing, federally owned housing or public housing". "Public housing" is defined as having "the same meaning given in Section 3(b) of the U.S. Housing Act of 1937." "Public housing" is defined there as "low-income housing . . . assisted under [the U.S. Housing] Act other than under Section 8".

The legislative history of Title X evidences Congress's intent that lead-based paint grant assistance should be provided

mainly for private housing. The Senate Report on Title X stated that "the primary purpose of Title X's grant program would be to assist cities and states in addressing the enormous lead paint poisoning risks posed by private low income housing" (emphasis added). It also stated that "the Committee's secondary purpose in expanding the grant program would be to jump start the private market's response to lead paint hazards. As it stands now, significant levels of activity to protect children in private housing from lead paint hazards is occurring in only a handful of states." Senate Report on the National Affordable Housing Act Amendments of 1992, Committee on Banking, Housing and Urban Affairs, 102nd Congress, 2nd Session, Report 102-332, pages 115-116.

Inasmuch as the housing that is the subject of your inquiry is owned by the City of Kankakee and, therefore, is not federally owned, nor is it the subject of any federal assistance, nor is it public housing, the housing would be eligible for assistance under the lead-based paint grant program. "When statutory language is plain, and nothing in the Act's structure calls into question this plain meaning, that is ordinarily 'the end of the matter.'" Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 552-53 (1987), quoting Chevron, 467 U.S. at 842; accord Hammontree v. National Labor Relations Board, 894 F.2d 438, 441 (D.C. Cir. 1990). Thus, the Supreme Court has held that where a statute is clear and unambiguous, *i.e.*, has a plain meaning, the agency must give effect to that plain meaning. The Lead Office's position that grants may be made to applicants to evaluate and reduce lead-based paint hazards in housing owned by a public agency, but not federally owned or the subject of any federal assistance, including under the U.S. Housing Act gives effect to the plain meaning of the statute and would be upheld by a reviewing court.

The Lead Office's policy that the City of Kankakee's housing may only be the subject of assistance under the lead-based paint grant program if the housing is also designated for sale to the private sector is also consistent with the law and the legislative intent. As indicated above, section 1011(a) of Title X provides that the Department may not make grants for federally owned housing, federally assisted housing or public housing. The law, however, does not state whether the Department may further limit the manner in which grants may be used. Where a statute is silent or ambiguous on a specific issue, the agency's interpretation of the statute will be upheld if the interpretation "is based on a permissible construction of the statute." Chevron, 467 U.S. at 843.¹ In our view, your

¹The reasonable and permissible standards for review of an agency's interpretation are normally considered in tandem by the courts. For example, in Tataranowicz v. Sullivan, 959 F.2d 268 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 963 (1993), the court stated that Chevron directs the court to

office's position that housing owned by the City of Kankakee must be designated for sale to the private sector would be upheld by a reviewing court.

"inquire whether the agency in charge of administering the statute has given it a 'permissible construction', for we may not substitute our view 'for a reasonable interpretation' made by an agency." Tataranowicz, 959 F.2d at 275, quoting Chevron, 467 U.S. at 843 and 844.

Chevron indicates that an interpretation is not permissible if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845, quoting United States v. Shimer, 367 U.S. 374, 383 (1961). Reasonable is defined as:

Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

Black's Law Dictionary 1265 (6th ed. 1990).

As noted above, more than one permissible construction may exist and the agency may choose which permissible construction to adopt. Chevron, 467 U.S. at 843 n.11. Similarly, the Supreme Court has frequently stated that a statute may have more than one reasonable interpretation. See, e.g., Federal Election Comm'n v. Democratic Senatorial Campaign Comm'n, 454 U.S. 27, 39 (1981) and ICC Indus., Inc. v. United States, 812 F.2d 694, 699 (Fed. Cir. 1987).