

Legal Opinion: GCH-0001

Index: 2.230

Subject: Comprehensive Grant Working Group Legal Issues

October 11, 1991

NOTE TO: Janice Rattley

FROM: Michael Reardon

SUBJECT: Comprehensive Grant Working Group Legal Issues

The purpose of this note is to address several legal issues which have been raised as a result of the working group's review of the draft final Comprehensive Grant Program (CGP) regulation.

QUESTION 1. Is there any problem with stating that a low-rent project that has not yet been converted to a homeownership project pursuant to sections 5, 21 of the Act, or pursuant to HOPE I and III, continues to be eligible for mod assistance under section 14?

QUESTION 1.

ANSWER. No.

ANSWER. Units which have not been converted to a homeownership project continue to be rental project units under section 14 and eligible for CIAP or CGP assistance. Previous policy was to limit a project to modernization to every 20 years under CIAP. Page 81 of the rule text is sufficiently specific on this point.

QUESTION 2. Is there is a legal opinion which provides that modernization assistance which has been obligated to a PHA on behalf of a low-rent project may still be used for that project, notwithstanding its conversion to a homeownership project? Is there any basis for extending this rationale to low-rent projects which are converted to homeownership status pursuant to section 5(h) of the Act, or HOPE I and III?

QUESTION 2.

ANSWER. Two legal opinions (August 7, 1989 memorandum from Frank Keating for David Caprara concerning Kenilworth-Parkside Sale; August 3, 1990 note from Robert Kenison to David Caprara concerning Carr Square/CIAP) are attached which respond to this question. It has been concluded that section 21(a)(2)(A) of the United States Housing Act of 1937 permits CIAP to a PHA after the sale of a project under section 21, but (1) the project must still meet the liveability standards before the sale and (2) a true commitment for CIAP funds in subsequent years, conditioned only upon the availability of future appropriations, would preempt the competitive process outlined in the Reform Act. In the event that the project is not sold under section 21, but under section 5(h), the CIAP provisions of section 21 would not be applicable and post-sale CIAP is not permitted. We would also

ANSWER.

extend these opinions to CGP assistance. We do not see any authority for similar treatment under HOPE I or III. However,

you should note that the CIAP/CGP funds could affect the purchase price and other program requirements. It may be advisable to complete the modernization work and then transfer the units to the homeownership program.

QUESTION 3. Mr. Kenison agreed that a setaside from new development money could be used by HUD to meet the requirements for a one-for-one replacement housing plan pursuant to the HOPE legislation. Would Kenison's view would also extend to permitting a setaside from section 14 modernization funds, which would then be used to rehabilitate units for use as replacement housing under HOPE? QUESTION 3.

ANSWER. No. Section 414 of the National Affordable Housing Act amends section 14 of the United States Housing Act of 1937 by adding the following subsection (n) which reads as follows: "The Secretary shall not make assistance under this section 14 available with respect to a property transferred under title III." Section 303(b)(3) of the United States Housing Act of 1937 provides implementation grants for this type of rehabilitation. ANSWER.

QUESTION 4. Are Turnkey III homeownership projects eligible comprehensive modernization under CIAP. Is repeated comprehensive modernization of Turnkey III projects permissible?. QUESTION 4.

ANSWER. We have previously provided our legal opinion on these issues. We understand that you want us to confirm our opinion with Mr. Keating. We also understand that you also request that we discuss with Mr. Keating whether replacing kitchens and bathrooms is an eligible special purpose physical improvement activity. Currently, such replacements would not be considered eligible physical improvements. We believe that the special purpose modernization definition could be amended to allow for these replacements. We will advise you later of Mr. Keating's opinions on these issues. ANSWER.

QUESTION 5. Are PHAs permitted to use the interest accrued on their reserve funds to carry out activities which do not appear to be authorized under the direct grant (i.e., does the interest accrued on a grant retain the same character as the direct grant, for purposes of determining the eligible activities?)? Also, are "self sufficiency" activities, such as boys scouts, girls scouts, etc. to be eligible management improvements under the guise of "tenant programs and services"? QUESTION 5. Are

ANSWER. Attachment D to OMB Circular A-102 provides that interest earned on advances of Federal funds shall be remitted to the Federal agency except for interest earned on advances to States or instrumentalities of a State as provided by the ANSWER.

Intergovernmental Cooperation Act of 1968. PHAs are not defined by the circular or the statute to be instrumentalities of a State. In addition, such interest to States and instrumentalities of States must be the subject of a separate

agreement (between the Secretary of Treasury and the State) which will describe the use of the interest. However, in a letter dated January 4, 1989 (attached), the Department of Treasury, Financial Management Service approved the replacement reserve approach as long as HUD retained oversight and the funds were used for the approved physical and management improvements specified in the comprehensive plan. We agree that all funds in the replacement reserve must be used for activities specified in a HUD approved comprehensive plan. We do not consider the examples provided to be "self-sufficiency" activities or activities which could be funded under the comprehensive plan.

QUESTION 6. Can HUD permit a PHA to borrow money from a

QUESTION 6.

third party, whereby it would use its anticipated mod income stream as the "collateral" for the loan? HUD wants the PHA to be able to use the borrowed money to carry out rehab work in the developments. However, it raises the issue of whether HUD could then permit CGP mod funds to be used to repay the loan (i.e., would this be deemed an eligible physical or management improvement??).

ANSWER. There are many conditions which would be required

ANSWER.

if a PHA borrowed money with the intention of repayment with CGP funds. HUD would not guarantee payment of the loan. The loan could not be superior to the declaration of trust. The loan would be subject to the availability of appropriations and the formula amount for that PHA. The PHA could not use any of its current property (real or personal) as collateral for the loan. The PHA would continue to be subject to all program requirements and poor performance could lead to a troubled status, conditioning or withholding of funds. Given the conditions mentioned, it is unlikely that any lender would be interested in such a loan. This approach gives HUD less discretion over the project activities and should also be considered more fully from a policy perspective.

QUESTION 7. Should the CGP rule follow the common rule on

QUESTION 7. Should procurements, as stated in Part 85?.

ANSWER. The CGP is covered by Part 85 procurement

ANSWER.

requirements because it is a grant program. The approach in other grant program regulations is to list only the exceptions to Part 85 (because section 85.1 and the definitions determine coverage of grant programs). However, PIH should consider any exceptions (e.g., CIAP exceptions from Part 85) that are necessary. Any other exceptions from Part 85 can only be made on a case by case basis. Additionally, any procedures that exceed Part 85 requirements must be the subject of rulemaking. To

further clarify the applicability of Part 85 to CGP, we will add appropriate references in the regulation text and preamble.