

Legal Opinion: GCH-0033

Index: 2.300

Subject: OGC Review of Waivers--Indian Housing Projects

December 20, 1991

MEMORANDUM FOR: Joseph G. Schiff, Assistant Secretary for
Public and Indian Housing, P

FROM: Robert S. Kenison, Associate General Counsel
Office of Assisted Housing and Community Development, GC

SUBJECT: OGC Review of Waivers to Convert Method of
Operation for Indian Housing Projects.

This memorandum responds to your request for an opinion concerning whether OGC needs to review waivers issued by the Office of Indian Housing for the conversion of an Indian housing project from one program of operation to another (e.g., rental to Mutual Help, Mutual Help to rental, or Turnkey III to Mutual Help).

Our conclusion is that, so long as: (1) the regulatory provisions sought to be waived are inapplicable on their face to the newly converted project (i.e., because the provisions clearly apply to new development of units, rather than to conversion of units from one program to another); and (2) the conversion request otherwise complies with the requirements established in § 905.455, 905.458 or 905.503, as applicable, such a waiver does not require OGC review.

In such cases, we believe that the waiver request would not meet any of the four tests established in General Counsel Keating's memorandum dated February 23, 1990, in which he stated that OGC review of program waivers is required whenever the waivers: (1) are precedential in effect; (2) alter in any way the competitive ground rules under which program funds are distributed to loan or grant applicants; (3) relate to litigation involving the Department; or (4) otherwise present novel decisions or circumstances.

Examples of regulatory provisions which may be waived as part of a conversion request, and which would not require OGC review, would include:

-- Waiver of § 905.404(a) (Program framework); 905.407(b)(1) and (3), and 905.407(c) (Application); 905.410 (HUD review of application), and 905.413(a), (b) and (d) (Special provisions for development of a Mutual Help project). These provisions may be waived since they refer to the construction,

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development and funding of new projects, rather than to existing

projects to be converted to a different method of operation.

-- Waiver of §905.416(c), (d) (Selection of Mutual Help homebuyers). This section requires the establishment of a waiting list and procedures for making homebuyer selections. However, to the extent that the applicant's request for conversion demonstrates that there are existing occupants in the units to be converted who qualify for and have requested transfer to the new program, this provision may also be waived since it is inapplicable on its face to an existing project.

-- Waiver of §905.419(b), (c) (Mutual Help contribution). This section requires execution of the Mutual Help and Occupancy (MHO) agreements before the execution of the construction contract; execution and approval of the land leases before construction start; terms for contractual compliance for the Mutual Help contribution before occupancy and provision of the entire contribution prior to occupancy. Since the timeframes established in this section are clearly applicable to a project to be constructed, rather than to an existing project, the timeframes may be waived to substitute a more appropriate time period, e.g., execution of MHO agreements and payment of contribution prior to conversion.

Our office would not consider to be exempt from OGC review any waivers which seek to waive substantive program requirements (e.g., the requirement for a Mutual Help Occupancy agreement, or the Mutual Help contribution, etc.), or which otherwise meet any of the four tests raised in General Counsel Keating's memorandum.

If you have any concerns, please contact me or Sharmeen Dosky at 708-8938.

Approved:

Disapproved: