

Legal Opinion: GCH-0073

Index: 2.200, 2.230

Subject: Modernization Funding of Certain Resident Initiatives

June 17, 1993

MEMORANDUM FOR: Janice D. Rattley, Director, Office of
Construction, Rehabilitation and
Maintenance, PC

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

SUBJECT: Modernization Funding of Certain Resident Initiatives
Activities

This is in response to your memorandum dated May 6, 1993, which requested a legal opinion on the eligibility of certain resident initiative activities for modernization funding. We will address these activities in the order provided in your memorandum.

1. Revolving Loan Fund. You have asked whether a revolving loan fund is a legally eligible activity. This question was addressed in a memorandum dated, June , 1993, to Dom Nessi, Acting Director, Office of Resident Initiatives, which is attached for your information.

2. Funding of Resident-Owned Businesses.

a. Purchase of Equipment. You have asked whether the purchase of equipment for donation to or non-temporary use by a resident-owned business is an eligible modernization activity. The purchase of equipment to carry out modernization activities is also addressed in my memorandum, dated June , 1993, to Dom Nessi. The purchase of equipment to carry out modernization force account work or for temporary use by a resident-owned business which has a contract for labor only with the housing authority are eligible activities. However, there is no legal basis for the purchase of equipment for donation to or non-temporary use by a resident-owned business.

Section 14(b) of the United States Housing Act of 1937 provides that the Secretary may make modernization assistance available to public housing agencies "for the purpose of improving the physical condition of existing low-rent public housing projects and for upgrading the management and operation of such projects to the extent necessary to maintain such physical improvements." This assistance may be made available only for low-rent housing projects which are owned by public housing agencies; are operated as rental housing projects and assisted under section 5 or section 9 of the United States Housing Act; are not assisted under section 8 of the United States Housing Act; and which meet such other requirements of the Secretary.

Economic development costs are eligible in both CIAP
(¹ 968.210(e)(3)(ii) and CGP (¹ 968.310(g)(1)) as part of management

improvement costs. Management improvements, development-specific or PHA-wide in nature, are eligible costs where needed to upgrade the operation of the PHA's developments, sustain physical improvements at those developments or correct management deficiencies. Management improvements and planning costs may be funded as a single modernization project. Economic development activities, such as job training, resident employment and contracting with resident businesses, for the purposes of carrying out activities related to the eligible management and physical improvements are eligible costs, as approved by HUD. HUD encourages PHAs, to the greatest extent feasible, to hire residents as trainees, apprentices, or employees to carry out the modernization program in CIAP or CGP, and to contract with resident-owned businesses for modernization work. See 24 CFR part 963, published May 11, 1992, at 57 Federal Register 20184.

It is our opinion that the purchase of equipment for donation to or non-temporary use (other than force account related equipment or contract-related purchase and temporary use of equipment) by a resident-owned business does not satisfy the requirements of section 14 or the regulations. However, the United States Housing Act does not prohibit PHAs from purchasing equipment for resident-owned businesses with rental income or operating subsidy.

b. Rehabilitation of Space for Use by Resident-Owned Businesses. You have asked if there are any legal limitations on what a housing authority may pay for in converting space for use by a resident-owned business. The conversion of dwelling space to non-dwelling space is an eligible modernization activity provided the housing authority has received HUD's approval. Guidance regarding operating subsidy waivers was provided in Notice PIH 90-39, issued August 24, 1990. A rule implementing this guidance has not been issued. The Notice only states that the space must be safe and suitable, and when the space is used for resident operated businesses it must be consistent with local laws. At the time that HUD reviews the request for the waiver, it would also review the proposed use of the unit. If the unit was to be used by a resident-owned business, it would have to be demonstrated that the business was related to the provision of low-income housing. Permissible businesses include but are not limited to child care, laundromats, security, maintenance-related businesses (e.g., screen repairs, cleaning, painting, equipment repairs) or other businesses related to the operation of the development.

To the extent that additional improvements such as additional electrical capacity are needed to operate the approved resident business in that space, such improvements could be assisted under section 14. Such improvements would meet the statutory requirement that modernization assistance is available to public housing agencies for the purpose of improving the physical condition of existing low-rent public housing projects and for upgrading the management and operation of such projects to the extent necessary to maintain such physical improvements.

c. Limitation of Type of Resident-Owned Businesses which may be Provided Non-dwelling Space. You have asked if there are any legal limitations on the type of resident-owned businesses which may be provided non-dwelling space and are there any legal limitations on the number of resident-owned businesses which may be provided non-dwelling space in a given development. As discussed in paragraph 2.b. above, the housing authority would have to demonstrate that the proposed resident-owned business was related to the provision of low-income housing. Businesses such as bakeries, beauty parlors and convenience stores should not be approved because they are not related to the provision of low-income housing. Notice PIH 90-39 provides

that operating subsidy waivers will be considered for not more than three years, subject to renewal, and waivers will not normally approve operating subsidy for more than one site (involving one or more contiguous units) for economic self-sufficiency services (including resident operated business) per public housing project. The number of resident-owned businesses which may be provided non-dwelling space in a given development is discretionary with HUD headquarters.

d. Lease Provisions for Use of Non-dwelling Space. You have requested guidance on the kinds of provisions which must legally be included in the lease between the housing authority and the resident-owned business for the non-dwelling space. You suggest the following provisions: lease terms (maximum two-year term with option to renew where approved by the Field Office); applicability of local law restrictions; amount of rental payment; employment preference to other residents; and responsibility of payment for utilities and routine maintenance.

On leases, section 203(A) of the Annual Contribution Contract provides as follows:

The Local Authority shall, unless otherwise approved by the Government, use the dwellings in the Projects solely for the purpose of housing Families of Low Income as provided in this Contract. It shall not, without the approval of the Government, grant any concessions, licenses, or permits to use any nondwelling space or facility in any Project at less than fair rental value, except for programs conducted by or primarily for the occupants of the Project or for temporary public, charitable, or similar use.

Section 203(A) of the ACC provides for flexibility in leasing non-dwelling space to resident-owned businesses. The only restrictions would be those imposed by HUD. To date, we are unaware of any mandatory HUD lease provisions. We agree that you could require the lease terms mentioned above. The lease would also have to be in accord with applicable State and local law. HUD should review these leases before execution by the housing authority. It should also be noted that leasing of dwelling or nondwelling space incident to the normal operation of the project for public housing purposes, as permitted by the ACC, is not considered a disposition. 24 CFR ¹970.2(d).

e. Treatment of Income/Operating Subsidy. Guidance is requested on the legal limitations with regard to the waiver of part 990. Generally, any income other than dwelling rental income is subject to the requirements at 24 CFR ¹ 990.109 and must appear in budgets approved by HUD. This income would be added to the projected average dwelling rental income per unit to obtain the Projected Operating Income Level. 24 CFR ¹990.109(e)(3). The Operating Income is then offset by operating subsidy (i.e., the operating income is counted in the performance funding system and reduces the amount of subsidy). 24 CFR ¹990.101(c)(5). The Authority could use its income for program purposes, but it would have to be able to compensate for the reduced operating subsidy. Resident initiative programs (economic development or resident management as described in parts 986 or 964) would be appropriate program purposes. Notice PIH 90-39 provides for a Headquarters waiver of part 990 to provide for operating subsidy of generally not more than one site (one or more contiguous units) per development for a three-year period. Additional waivers are discretionary with HUD Headquarters but would be limited to approved resident businesses and other eligible purposes described in the Notice.

Attachment