

Legal Opinion: GCH-0080

Index: 2.231, 2.270
Subject: Vacancy Reduction Program

January 26, 1993

NOTE TO: NANCY CHISHOLM

FROM: BOB KENISON

SUBJECT: Vacancy Reduction Program

This responds to your cc mail message requesting legal advice as to whether section 14(p)(4)(A) of the USH Act requires, for each PHA participating in the vacancy reduction program, an "onsite assessment of the vacancy situation of the agency by a team of knowledgeable observers." You propose construction of the statute to require only that HUD offer to provide for such an assessment, at the option of the PHA. The justification you suggest is that there is much available data on the causes and cures for vacancy problems, thus making an assessment unnecessary. It does not appear to us that there is a persuasive nexus between the availability of such data and making such an assessment optional with the PHA, since obviously a problem exists notwithstanding the availability of data.

Two issues are presented: whether an assessment must be made and when it must be made. As to the former, we believe that the statutory language "shall provide," in its plain meaning, is not the same as "shall make available" at the option of the PHA. We do not believe that this statutory language can reasonably be construed as requiring only that HUD offer an assessment, which the PHA can decline and still comply with the program requirements. It may be further observed, that unlike either formula funding (comp. grant and operating subsidy) or discretionary programs (CIAP and PH development) PHAs with specified vacancy levels are required to participate in the program, although program funding depends on submission of an acceptable plan and competitive selection.

The legislative history pertinent to this issue is sparse. The only discussion we found is contained in the NAHA Conference Report (H.R. Rep. 1201-943, p. 425): "A team of HUD and PHA experts would be available to visit each designated PHA to independently assess the reasons for the agency's high vacancy rate. The team would consider any management deficiencies which might be contributing to the vacancy problem and would recommend a series of management improvements to be included in an agency's vacancy reduction plan." The 1992 Act amended section 14(p)(4)(A) to provide that the assessment team shall include officials of the PHA involved, without discussion.

The 1992 Act, however, also amended section 6(j) of the USH Act to provide that, upon designating a PHA as troubled and determining that a review will not duplicate any assessment made under section 14(p), "the Secretary shall provide for an on-site independent assessment of the management of the agency." This statutory provision provides for the assessment to be carried out by a team of knowledgeable individuals selected by HUD and specifies

issues the assessment shall consider, to the extent HUD deems appropriate. This assessment team is required to consult with the residents and public and private entities in the jurisdiction.

The requirement for an assessment under section 6(j) originated in the Senate Bill and is explained in the Senate Committee Report (S. Rep. 102-332, p. 47). This Report states that "The committee bill would require HUD...to provide for an on-site independent management assessment carried out by a knowledgeable assessment team." The Report expresses the belief that independent experts are in a better position than HUD to determine the root causes of management deficiencies and recommend actions to remedy the deficiencies. It further emphasizes the requirement for consultation with tenants since they "are the real 'experts,' knowing better than anyone else the effects of bad management." Troubled PHAs are subject to both assessments, although the 1992 amendments stipulate that a troubled PHA can only receive vacancy reduction funding if it is making substantial progress in remedying its management deficiencies or provides reasonable assurances that it will do so.

Although we do not believe that either assessment requirement may be regarded as optional, either with PHAs or HUD, we have two suggestions for dealing with the time and resource problems presented. First, as to troubled PHAs, which presumably have the worst problems, a section 6(j) assessment can be made so as to meet the statutory requirements under both sections 6(j) and 14(p), so that only one assessment would be required.

Secondly, as to the section 14(p) assessment, we believe there is considerable latitude as to the timing of the assessment. Assuming that PIH wishes to condense the procedures, with particular reference to the FY 1993 NOFA, we believe that the PHA's vacancy reduction plan could be submitted in response to this NOFA, with assessments prior to submission for those PHAs that want or need help in preparing their plans. As to other PHAs, with particular reference to those for which you propose that no assessment be made, we believe that the assessment could be made after HUD reviews of the plans and tentative decisions as to priorities have been completed, somewhat similar to the CIAP joint reviews. Provided that recaptures would not be involved, we would not rule out making these assessments after reservation of funds.