

NOFA for Planning Grants for Non-Profit CBOs and RCs

Legal Opinion: GHM-0040

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Subject: NOFA for Planning Grants for Non-Profit CBOs and RCs

June 16, 1992

MEMORANDUM FOR: Grady J. Norris, Assistant General Counsel
Regulations Division, GLR

THROUGH: John J. Daly, Associate General Counsel
Insured Housing and Finance, GH

FROM: David R. Cooper, Assistant General Counsel
Multifamily Mortgage Division, GHM

SUBJECT: FR-3288, NOFA for Planning Grants for Non-profit
Community-Based Organizations (CBOs) and Resident
Councils (RCs) D-3444

This Office has reviewed the "NOFA for Planning Grants for Non-Profit Community-Based Organizations (CBOs) and Resident Councils (RCs)" (the "NOFA") and the "Application Package for Planning Grants" (the "Application"). The NOFA is based on appropriations authorized for technical assistance in the 1992 Appropriations Act (Public Law 102-139). Because the appropriations language does not correspond to the language in Title II or Title VI concerning technical assistance, it would be helpful to clarify the Department's assumptions in drafting the NOFA.

The 1992 Appropriations Act states that "up to \$25,000,000 shall be for use by nonprofit organizations, pursuant to section 212 of the Emergency Low Income Housing Preservation Act of 1987, as amended by the Cranston-Gonzalez National Affordable Housing Act (Public Law 101-625), and for tenant and community-based nonprofit education, training and capacity building and the development of State and local preservation strategies...." Since neither Title II nor Title VI expressly authorize HUD to provide this funding, we have interpreted the appropriations language as creating authority for HUD to provide this additional funding. Title II and Title VI authorize the Department to provide assistance only where there is an approved or approvable plan of action. The appropriations language does not contain this limitation. Because the appropriations language authorizes funding for education and training purposes, the Department has decided to provide the assistance at the beginning of the preservation process, prior to the submission of a plan of action.

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We have interpreted the appropriations language as

authorizing technical assistance for projects which are proceeding under Title II as well as Title VI. Since neither Title II nor Title VI specifically authorizes technical assistance of the sort contemplated in the appropriations language, and because the appropriations language is ambiguous on this point, we believe that there is latitude for interpreting the language as applying to projects under Title II and Title VI.

The appropriations language refers to assistance "for use by nonprofit organizations, pursuant to section 212" of Title II as amended by Title VI. However, this cite is incorrect. Section 212 of Title VI governs notices of intent and has nothing to do with nonprofit organizations and there is no Section 212 in Title II. The legislative history provides no guidance on this issue and because we are unsure of what the correct cite should be, we have decided that the only alternative is to disregard the cite.

We have the following specific comments on the NOFA and Application, of which items, 2, 3, 9, and 10 are nonconcurrency comments:

1. Throughout the NOFA and Application, reference is made to "planning grants" and "technical assistance." Assuming that both terms refer to the same assistance, the NOFA and Application should consistently refer to either one or the other type of assistance. If there are separate types of assistance, this should be clarified.
2. Lines 19 through 21 on page 1 of the NOFA state that applicants for assistance must comply with Section 248.173 and 248.175 of the regulations. Those sections govern plans under the resident homeownership program of Title VI, but not plans to retain the housing as rental housing under Title VI or Title II. The reference to these two regulatory provisions is too narrow. Instead, the NOFA should be amended to state that applicants must comply with "Title II of the Housing and Community Development Amendments of 1987, the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) or Subtitle A of Title VI of the National Affordable Housing Act, the Low Income Housing and Resident Homeownership Act of 1990 ("LIHPRHA") and the amended part 248 of title 24 of the Code of Federal Regulations."
3. Line 21 on page 5 of the NOFA sets a cap on Phase I funding at the lesser of \$25,000 for the project or \$250 per unit. However, the NOFA does not cap Phase II or Phase III funding. Paragraph 5 on page 2 of the Application sets a cap on funding of \$500 per unit or \$100,000 for the project, whichever is less. However, the Application does not specify whether this is a maximum for each of the three funding phases, or whether it is the total amount of

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assistance per applicant. The NOFA and Application should be amended to be consistent on this point.

Also, Section 248.157(m)(7) of the regulations sets a cap on the amount of technical assistance a resident council pursuing homeownership may receive at \$500 per unit or \$200,000 per project, whichever is less. There seems to be some question as to how the assistance in the NOFA relates to the assistance in Section 248.157(m)(7). It seems that the position of the Office of Housing is that these are separate types of assistance. The NOFA funding is provided to resident councils and community based nonprofit organizations at the beginning of the process, for organizing and training, submission of a bona fide offer, and preparation of a plan of action. The 248.157(m)(7) funding is provided to resident councils which have an approved homeownership plan for training (including reimbursement for training costs incurred prior to approval of the homeownership plan). There should be some discussion in the NOFA as to how these two types of funding interact. Will a resident council be able to apply for both types of funding? Is there a cap on the combined funding it may receive?

4. Lines 21 and 22 on page 7 of the NOFA state that grant funds for preparing a plan of action must be matched from non-federal sources on a dollar-for-dollar basis. More explanation regarding matching grants would be helpful. Who may provide the matching grant? What type of proof is required by the applicant?

5. Lines 15 through 18 on page 11 of the NOFA state that community based nonprofit organizations must have tenant support in order to receive funding. The appropriations language does not require tenant support as a condition for funding, but seems to allow all community based nonprofits to apply for assistance. The NOFA language has the effect of narrowing the class of applicants. We could argue that the Department has administrative discretion to decrease the size of the applicant pool, especially in the face of limited funding. However, the Office of Assisted Housing and Community Development took this approach with the Block Grants program and ran into a lot of trouble with the General Accounting Office. Instead of excluding community based nonprofits without tenant support from the applicant pool, we recommend creating a funding priority for community based nonprofits with tenant support.

6. Lines 1 through 5 on page 16 of the NOFA state that applicants must submit an attorney's opinion that the organization is established under the laws of the

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appropriate jurisdiction. This requirement is stricter than the regulatory requirements imposed on entities submitting an expression of interest and bona fide offer to purchase the property under Section 248.157 of the regulations. It does not seem to make sense to require more information to receive a planning grant than to purchase the property.

Rather than requiring an attorney's opinion, we suggest requiring a public agency to submit a copy of its authorizing legislation and requiring resident councils and nonprofit organizations to submit a copy of their certificate of incorporation.

7. Somewhere in the NOFA it should be noted that assistance is only available in connection with eligible low income housing for which there has been no application for HOPE II funding. The Office of Resident Initiatives is currently clearing a set of draft letters to be issued to the field offices concerning the interaction of HOPE II and Title II and Title VI. It may be helpful to cross-reference these letters.

8. The NOFA seems to imply that all applicants for funding will receive assistance as long their applications are complete. However, because the appropriated funds may be insufficient to cover all of the applications, we suggest some kind of ranking system. Also, the NOFA seems to indicate that HUD will provide the amount of assistance which is requested. At the very least, the NOFA should state that the amount provided will be for "reasonable" expenses in the categories indicated in the NOFA. Also, the NOFA does not indicate how HUD will handle cases where more than one applicant is requesting funds for the same project. Currently, the NOFA requires all applicants to have tenant support, which would eliminate the problem, but note Comment 5. Will assistance be provided to all the applicants for the project or only to one, and if one, which applicant?

9. Paragraph 1 on page 1 of the Application states that Title II and Title VI "eliminates the right of owners of most low-income housing financed with U.S. Department of Housing and Urban Development (HUD) mortgages to prepay...." There are a number of errors in this statement. First, Title II and Title VI do not eliminate the right of an owner to prepay its mortgage. Both statutes restrict the right to owners which have a HUD-approved plan of action. Once a plan of action is approved, the owner may prepay its mortgage. Second, Title II and Title VI do not apply to "most low-income housing" financed by HUD. They apply only to projects which are insured or assisted by HUD under Sections 221(d)(3) or 236 of the National Housing Act and which are within two years of being able to prepay without HUD's consent. The quoted language should be amended to

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state that Title II and Title VI "restrict the right of owners of certain insured and/or assisted multifamily low income housing to prepay."

10. Paragraph 2 on page 1 of the Application lists as an eligible applicant resident councils working "in conjunction with public agencies." Apparently this reference refers to the resident homeownership program set forth in Section 226

of Title VI which requires resident councils to work with other entities in developing a resident homeownership plan. Section 226(a) of Title VI states, in part, that a resident council shall work with "a public or private nonprofit organization or a public body (including an agency or instrumentality thereof)." In order to accurately reflect the statute, the quoted statutory language should be inserted in place of "public agencies" in paragraph 2 of the NOFA.

11. Exhibit 3 of the Application lists the contents of an application for preparation of a plan of action. Since the NOFA requires that funding under this phase be matched on a dollar-for-dollar basis, proof that the applicant will be able to obtain a matching grant should be submitted as part of the application.

12. Additional editorial comments are indicated on the attached mark-up.

If you have any questions regarding this matter, please contact Susan M. Sturman at 202-708-3667.