

Lease Provisions--Drug-Free Housing [FOIA Exemption 4: Names of Private Parties Withheld]

Legal Opinion: GHM-0089

Index: 3.300, 3.320, 3.325, 3.340
Subject: Lease Provisions--Drug-Free Housing
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September 2, 1993

MEMORANDUM FOR: James J. Tahash, Director, Planning and
Procedures Division, HMHP

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

SUBJECT: Lease Provision for Drug-Free Housing

I am writing in connection with the attached letter from _____, Vice President, of _____ Property Management, Inc., seeking the Department's approval for the continued use of certain language regarding illegal drug use in the Department's Model Lease for Subsidized Programs ("Model Lease"), that appears in Appendix 19a of HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs. (Attachment A.) The language that Ms. _____ would like to continue to employ was approved for _____'s use by this office in July of 1991. We have reviewed the incoming and determined that resolution of this matter involves a policy determination, therefore, we are forwarding Ms. _____'s request to your office for direct handling. We have advised Ms. _____, under separate cover, that we have so forwarded her request, and we ask that you copy this office, as well as Michael Reardon's office, on your response to her.

We believe that Ms. _____'s request stems from a February 8, 1993 memorandum that this office sent, with your office's concurrence, to the Richmond Field Office. (Attachment B.) In that memorandum, we informed the Richmond Field Office that revised chapter 4 of Handbook 4350.3, CHG-22, which was effective on June 30, 1992, mandates the use of precise language regarding illegal drug activity. The Department's present policy mandates that section 23(b) of the Model Lease contain the following language: "Any termination of this Agreement by the Landlord must be carried out in accordance with HUD regulations, State and local law, and the terms of this Agreement. The Landlord may terminate this Agreement only for: ... criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a tenant, any member of the tenant's household, or any guest or other person under the tenant's control; ..." (Emphasis added.) (See page 4-5 and revised page 13 of 15 of Appendix 19a of revised chapter 4 to Handbook 4350.3, CHG-22.)

Accordingly, we further indicated that this office can no longer approve

individual lease provisions regarding illegal drug activity because the Department has determined that, rather than approving such individual lease provisions, the language set forth in revised chapter 4 to Handbook 4350.3, CHG-22, must be utilized. Revised chapter 4 of Handbook 4350.3, CHG-22, states that the lease provision set forth in footnote 1 of this memorandum is mandatory, and HUD Field Offices and State Agencies may not approve changes to it. (See paragraph 4-2(d)(3) and Exhibit 4-3, pages 4-3 and 4-21, respectively, of revised chapter 4 to Handbook 4350.3, CHG-22.) Finally, we advised the Richmond Field Office that it was the policy of the Office of Housing that projects which have incorporated lease provisions regarding illegal drug activity that were previously acceptable to the Department must revise their leases to conform to the language presently set forth in revised chapter 4 of Handbook 4350.3, CHG-22. In accordance with this information, on March 2, 1993, Richard D. Warren, Chief of the Loan Management Branch in the Richmond Field Office, advised that its Model Lease had to conform to the language that presently appears in revised Chapter 4 of Handbook 4350.3, CHG-22. (Attachment C.)

Since Ms. seeks to continue to employ language that, while once acceptable to the Department, is presently at variance from that required by revised chapter 4 of Handbook 4350.3, CHG-22, she is in effect seeking a waiver of the current Handbook on this issue. As her request involves a Handbook, rather than a statute and or regulation (which, of course, are not waiveable unless there is a statutory or regulatory provision for waiver), and because the language she seeks to continue to use was previously approved by this office, we are forwarding her request to your office for direct handling. Of course, any decision to grant Ms. 's request would have to comply with section 106, "Waiver of Regulation Requirements and Handbook Provisions," of the Department of Housing and Urban Development Reform Act of 1989.

Finally, we have one further thought in connection with this matter. Ms. requests that the Department "allow ['s] previously approved drug language to remain intact." It seems (based upon the March 2, 1993 letter from Mr. Warren that is referenced above), that seeks to include both the language on drug use (as set forth in footnote 1 of this memorandum) that is currently required by revised chapter 4 of Handbook 4350.3, CHG-22, as well as the language that was previously approved by this office for 's use in July of 1991. While the provisions are similar, they are not identical, and we would point out that it is generally better not to have two separate contract provisions that deal with the same issue. Treatment of

a contract term, such as lease terminations for illegal drug activity, in only one manner within a contract, helps to ensure that the standards and requirements of the contract are clearly defined.

Please contact Frances MacFarlane, of my staff, at (202) 708-4107 with any questions you may have on this matter.

Attachments