

Eligible Mortgagor--Section 232[FOIA Exemption 4: Names of Private Parties and Business Entities Contemplating a Merger Are Withheld]

Legal Opinion: GHM-0091

Index: 3.145, 3.220, 3.295

Subject: Eligible Mortgagor--Section 232

[FOIA Exemption 4: Names of Private Parties and Business Entities Contemplating a Merger Are Withheld]

October 6, 1993

Donald F. Libretta, Esq.  
Krooth & Altman  
1850 M Street, N.W.  
Washington, DC 20036-5803

Re: Nursing Home  
New York, New York

Dear Mr. Libretta:

This responds to your letters, dated July 23, 1993 and September 20, 1993, respectively, concerning whether a not-for-profit corporation, validly formed under New York law by the merger of two corporate entities, each involved in the ownership of a nursing home adjacent to the other, can be an eligible section 232 mortgagor. It is our opinion that the corporation surviving the merger can qualify as an eligible mortgagor under section 232 of the National Housing Act ("Act"), subject to satisfying the conditions set forth in detail below.

To begin, we understand that Nursing Home presently owns and operates an existing facility in New York. Nursing Home also operates the immediately adjacent Nursing Home, which is owned by a different corporate entity. We further understand, from your conversation with Frances MacFarlane, of this office, that both entities are New York not-for-profit corporations. Neither of the nursing homes, which are separated by a common boundary, have thus far applied for or received FHA-mortgage insurance. The nursing homes wish to effectuate a corporate merger under the laws of the State of New York, with the resulting corporation being Nursing Home. After the merger, Nursing Home will apply for section 232 mortgage insurance for the substantial rehabilitation of both facilities.

As noted above, it is our opinion that Corporation, as the surviving corporation, can qualify as an eligible mortgagor under section 232 of the Act, subject to the satisfaction of the following conditions:

1. In the section 232 mortgage insurance program all mortgagors must be approved by the Commissioner and must possess the legal powers necessary and incidental to operating the

project. Of course, where a mortgagor leases the property or project to a qualified operator, the lessee must be approved by the Commissioner and must

possess the legal powers necessary and incidental to operating the project. 24 C.F.R. 232.20(a). 24 C.F.R. Section 232.20(a). See also paragraph 2-4(B) of Handbook 4600.1 REV-1, Section 232 Mortgage Insurance for Residential Care Facilities (Nursing Homes, Intermediate Care Facilities, and Board and Care Homes). Accordingly, subsequent to the merger, Nursing Home must possess the legal powers necessary and incidental to operating the project, including all necessary licenses and approvals from the State and/or other licensing authorities with jurisdiction over the project. In addition, if the financing transaction proceeds, Nursing Home will also have to agree to be regulated by the Department through a Regulatory Agreement. 24 C.F.R. Section 232.45(a). See also paragraph 2-4(A) of Handbook 4600.1 REV-1.

2. The merger must, as indicated in your July 23rd letter effectively dissolve Nursing Home and transfer all of its assets and liabilities to Nursing Home as the surviving corporation. In this regard, we expect that when the merger is effected under New York law, Nursing Home, as the surviving corporation, will possess all the rights, privileges, immunities, powers and purposes of both Nursing Home and Nursing Home, and all the real and personal property and other assets of both corporations will vest in Nursing Home as the surviving corporation. N-PCL Section 905(b)(1) and (2). Furthermore, Nursing Home will assume all the liabilities, obligations and penalties of each participating corporation in the merger, and the merger will not release any liability, obligation or claim, or abate any pending action or proceeding, civil or criminal, against any participating corporation or any member, officer or director of such corporations. N-PCL Section 905(b)(3).

In connection with this second condition we note that when processing an application for section 232 mortgage insurance the Department at times requires both current and historical financial information. See e.g. paragraph 4-4(E) of Handbook 4600.1 REV-1 and question 5(A)(5) of Form HUD-3433, Request for Determination of Eligibility as Nonprofit Sponsor and/or Mortgagor. We expect that when historical financial information is required, the Department will receive such information as it existed for both constituent corporations, i.e., Nursing Home and Nursing Home, despite the fact that they will have been merged.

3. There must be compliance with HUD's sole asset mortgagor requirement. See paragraph 2-4(C) of Handbook 4600.1 REV-1 and paragraph 11(c) of Form HUD-92466-E, Regulatory

Agreement for Housing for the Elderly, Nursing Homes, Intermediate Care Facilities and/or Board and Care Homes (Nonprofit Only). This requirement can be satisfied as you outlined in your July 23rd letter. In this regard, you indicated that the two nursing homes are the current "sole assets" of Nursing Home and Nursing Home. You further indicated that upon completion of the merger the two nursing homes will be the "sole assets" of the surviving corporation Nursing Home, and the insured mortgage to be created under section 232 of the

Act will cover both nursing homes.

4. The charter of Nursing Home must be amended to incorporate all of the HUD-required provisions for eligibility for mortgage insurance under section 232 of the Act. See paragraph 2-4(F)(1) and Appendix 15 of Handbook 4600.1 REV-1.

5. The merger must be completed in advance of applying for mortgage insurance in order to ensure that the mortgagor, Nursing Home, is in a position to gain the usual HUD approvals for mortgagors, such as previous participation clearance, and the required determination that Nursing Home is eligible as a nonprofit mortgagor. See 24 C.F.R. Section 200.217(a)(1) and paragraphs 3-13 and 8-3(B) of Handbook 4600.1 REV-1.

Of course, as indicated in your July 23rd letter, as with any section 232 applicant, all other HUD requirements for mortgage insurance would have to be met in order for the contemplated transaction to occur.

Please contact Ms. MacFarlane, at (202) 708-4107, with any questions.

Very sincerely yours,

David R. Cooper  
Assistant General Counsel  
Multifamily Mortgage Division