Legal Opinion: CIM-0110

Index: 3.600
Subject: Preservation Eligibility

February 22, 1995

MEMORANDUM FOR: Linda D. Cheatham, Director
Office of Insured Multifamily
Housing Development, HMI

FROM: John J. Daly, Associate General Counsel
Office of Insured Housing, CI

SUBJECT: Parc Chateau Apartments
Project No. 073-55058
Indianapolis, IN

This memorandum is in response to a request from Frank Malone for a determination of the eligibility of the above project to participate in the Preservation program. Our office has determined that the project is eligible for participation in the Preservation program under either Title II of the Housing and Community Development Act of 1987, The Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C. 1715l (ELIHPA) or Title VI of the National Affordable Housing Act, The Low-Income ousing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. 4101 et. seq. (LIHPRHA), provided that eligibility procedures outlined in HUD Handbook 4350.6 are followed by the project's owners.

The issue raised is whether Parc Chateau Apartments, a project which was formerly insured under Section 221(d)(3) with a nonprofit owner at a below-market interest rate under Section 221(d)(5), then acquired by HUD at a foreclosure sale and subsequently sold with a purchase money mortgage (PMM) which is currently not subject to prepayment prohibitions, is eligible for participation under either ELIHPA or LIHPRHA. The determination of eligibility under both ELIHPA and LIHPRHA is a two-part inquiry. First, a project must be financed by a loan or mortgage that is of a type specified in the statute and regulations. Second, the project must be eligible for prepayment without the Secretary's prior consent. As discussed below, the project meets both parts of the eligibility tests under ELIHPA and LIHPRHA.

According to the relevant facts presented, Parc Chateau Apartments was originally insured under Sections 221(d)(3) and (5) at a below-market interest rate with a nonprofit owner. Upon default of the mortgage, HUD acquired the project at a foreclosure sale in 1977. HUD sold the project with a PMM to the current limited dividend owners in 1983. The PMM was subject to a five-year prepayment prohibition which expired in March 1988.

The owners of the project have filed a Notice of Intent (NOI) and a Plan of Action (POA) under ELIHPA. They have also submitted a Notice of Election to Proceed Under LIHPRHA with the option to revert to ELIHPA (HUD form 9610, 5.b.). It is unclear, based upon the documentation submitted to our office, whether or not all of the transition provisions in HUD Handbook 4350.6, Paragraph 2-7 have been followed by the owners, and whether or not the owners have elected to proceed under LIHPRHA or to revert to ELIHPA.

The memorandum from Mr. Malone suggests that the project should not be eligible for Preservation because the original owner was a nonprofit organization. While it is true that a project with a nonprofit owner is ineligible for participation under the Preservation program because of prepayment prohibitions, the current owner of Parc Chateau Apartments, a limited dividend entity, was eligible for prepayment without prior HUD approval as of March 1988 under the PMM. The two steps of the eligibility inquiry must be considered separately.

Under the LIHPRHA and ELIHPA statutes and 24 C.F.R. Part 248, Parc Chateau Apartments qualifies as "eligible low-income housing" for purposes of Preservation participation. See, LIHPRHA Section 229(1); ELIHPA Section 233(1); 24 C.F.R. Section 248.201; and 24 C.F.R. Section 248.101. Pursuant to LIHPRHA and ELIHPA the determination of "eligible low-income housing" is a two-part process. LIHPRHA defines "eligible low-income housing" as:

"any housing financed by a loan or mortgage-
(A) that is-
(i) insured or held by the Secretary under section 221(d)(3) of the National Housing Act and receiving loan management assistance under section 8 of the United States Housing Act of 1937 due to a conversion from section 101 of the Housing and Urban Development Act of 1965;
(ii) insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act;
(iii) insured, assisted, or held by the Secretary or a State or State agency under section 236 of the National Housing Act; or
(iv) held by the Secretary and formerly insured under a program referred to in clause (i), (ii), or (iii); and
(B) that, under regulation or contract in effect before February 5, 1988, is or will within 24 months become eligible for prepayment without prior approval

of the Secretary." ELIHPA Section 233(1) and the implementing regulations at 24 C.F.R. §Section 248.101(a) and (b) contain the same definition of "eligible low income housing" as found in LIHPRHA Section 229(1) except that ELIHPA Section 233(1)(B) appears as follows:

"(B) that, under regulation or contract in effect before the date of the enactment of this Act, is or will within 1 year become eligible for prepayment without prior approval of the Secretary." LIHPRHA Section 229(1) (emphasis added).

The above statutory provisions of LIHPRHA were implemented by 24 C.F.R. Sections 248.101(1) and (2).

Pursuant to the statutory provision quoted above, a project, to be eligible for participation under LIHPRHA or ELIHPA, must, first, be financed by a certain type of loan or mortgage. The relevant type for our analysis is one that is "held by the Secretary and formerly insured. . ." at a below-market interest rate as provided for under Section 221(d)(5) of the National Housing Act. LIHPRHA Section 229(1)(A)(iv); ELIHPA Section 233(1)(A)(iv). Second, the project loan or mortgage must be eligible, "under regulation or contract," for prepayment without HUD's prior consent. LIHPRHA Section 229(1)(B); ELIHPA Section 233(1)(B).

The regulations at 24 C.F.R. Section 248.101, which implement the LIHPRHA eligibility test under Section 229(1), clarify what type of loan or mortgage is referred to in LIHPRHA Section 229(1)(iv). This provision provides that a project is eligible for participation under LIHPRHA if it is:

"financed by a loan or mortgage (1) That is--(iv) A purchase money mortgage held by the Commissioner with respect to a project which, immediately prior to HUD's acquisition, would have been. . .(ii) Insured or held by the Commissioner under [Section 221 of the National Housing Act] and bearing a below market interest rate. . ." 24 C.F.R. Section 248.101(1) The first part of the eligibility test under the regulations governing eligibility under ELIHPA, 24 C.F.R. Section 248.201(a), is similar to that found in the regulations implementing the LIHPRHA eligibility test at 24 C.F.R. Section 248.101(1). (emphasis added).

Parc Chateau Apartments is currently subject to a PMM which is held by the Commissioner. Moreover, immediately prior to HUD's acquisition of Parc Chateau Apartments at the foreclosure sale, the mortgage loan was insured under Sections 221(d)(3) and (5) at a below-market interest rate. Therefore, the project

clearly satisfies the first part of the eligibility analysis under the ELIHPA and LIHPRHA statutes and implementing regulations.

The ELIHPA and LIHPRHA statutes and the regulations at 24 C.F.R. Part 248 provide, relating to the second part of the eligibility inquiry, that the project loan must be eligible for prepayment without the Secretary's prior consent. As previously quoted, LIHPRHA requires that the project be subject to a loan or mortgage that, under "regulation or contract" executed prior to February 5, 1988 "is or will within 24 months become The statutory language "is or will within 24 months" has been interpreted to mean that the project owner must be eligible to prepay on the date of submission of the NOI or within 24 months of that date." eligible to prepay without the Secretary's prior approval.

LIHPRHA Section 229(1)(B). ELIHPA requires that the project be subject to a loan or mortgage that "under regulation or contract" executed prior to the date of ELIHPA's enactment February 5, 1988., "is or will within 1 year become The statutory language "is or will within 1 year" has been interpreted
to mean that the project owner must be eligible to prepay on the date of submission of the NOI or within one year of that date. " eligible to prepay without the Secretary's prior approval.

The fact that Parc Chateau Apartments was originally subject to prepayment prohibitions does not prevent the project from meeting the second requirement. Parc Chateau Apartments was sold with a PMM which was executed in 1983, prior to the February 5, 1988 date required by both ELIHPA and LIHPRHA. Furthermore, under the PMM contract, the mortgage was eligible for prepayment without the Secretary's prior consent in March 1988. It appears from the documentation submitted to our office that the first NOI under ELIHPA was filed in February of 1990, and the Notice of Election to Proceed under LIHPRHA was submitted in May of 1992. The project owners were eligible to prepay without prior HUD approval prior to both dates. Accordingly, the project meets the second part of the eligibility test under both ELIHPA and LIHPRHA and the implementing regulations. You should ensure that the dates relied on above are accurate.

In view of the foregoing, Parc Chateau Apartments is "eligible low-income housing" for purposes of participation in the Preservation program under either ELIHPA or LIHPRHA. As stated above, however, you should ensure that all relevant HUD procedures in HUD Handbook 4350.6 have been followed by the owners.

If you have any questions, please contact Athena Katcheves at 708-3667.