Sec. 231 Elderly Hsg.--Adm. Fees--Enforcing Reg. Agree.

Legal Opinion: GHM-0048

Index: 3.140, 3.265
Subject: Sec. 231 Elderly Hsg.--Adm. Fees--Enforcing Reg. Agree.
FOIA Exemption 6: Project Identifiers Withheld

September 28, 1992

MEMORANDUM FOR: Albert B. Sullivan, Acting Director
Office of Multifamily Housing Management, HMH

Attention: William W. Hill

/s/ Gains E. Hopkins for
FROM: David R. Cooper, Assistant General Counsel
Multifamily Mortgage Division, GHM

SUBJECT:
FHA Project No.

This responds to an inquiry dated July 15, 1992 from William Hill, the Director of Operations Division, concerning whether the "Department would be exposed to any liability" by approving the prepayment of the mortgage note for the captioned project. More particularly, at issue is whether the Department would be exposed to liability if the Office of Housing determines not to enforce Paragraph 9(j) of the Regulatory Agreement against this mortgagor, or unconditionally consent to the prepayment of the mortgage note. We conclude that it is within the Office of Housing's discretion either to enforce Paragraph 9(j) of the Regulatory Agreement against this mortgagor, or to accept prepayment of the mortgage note.

Background

The mortgagor, a nonprofit entity, operates a multifamily housing project for the elderly, which the Department endorsed for mortgage insurance on November 24, 1970, pursuant to Section 231 of the National Housing Act. The mortgagor is operating the project in violation of Paragraph 9(j) of the Regulatory Agreement, by collecting an "admission fee in the amount of $15,000 per tenant as a condition of occupancy."

Paragraph 9(j) of the Regulatory Agreement provides as follows:

> The Mortgagor shall not collect from tenants or occupants or prospective tenants or occupants of the project an admission fee, founder's fee, life-care fee, or similar payment pursuant to any agreement, oral or written, whereby the Mortgagor agrees to furnish accommodations or services in the project to persons making such payments.

When this violation of the Regulatory Agreement was brought to the mortgagor's attention, the mortgagor offered to prepay the mortgage.

Analysis

Section 231 of the National Housing Act neither prohibits the collection of an admission fee from tenants nor requires the collection of an admission fee. Indeed, before 1966 - the year this project was constructed - the Department's policy permitted collection of an admission fee, although sometime thereafter this policy was changed. In a memorandum dated September 5, 1967, to the then Assistant Commissioner for Multifamily Housing, Morton W. Schomer the then FHA General Counsel, A. M. Prothro, stated that the legislative history of Section 231 of the National Housing Act is silent with respect to the collection of an admission fee. Since the statute and its legislative history are silent, there is no statutory impediment to changing the policy, i.e., prohibiting mortgagors from requiring an admission fee. (A copy of this memorandum is attached for your convenience).

The prohibition against collecting an admission fee is an administratively created prohibition imposed by the Regulatory Agreement under the Secretary's broad statutory authority "to insure . . . upon such terms and conditions as he may prescribe." Paragraph 12 of the Regulatory Agreement also leaves for the Commissioner's discretion whether to take action upon a violation of any of its provisions, including collecting an admission fee.

The prepayment restriction provides similarly broad discretion to the Department concerning the terms and conditions the Department may impose on prepayment. (It should be noted that this project is an unsubsidized project that is not subject to any of the statutory prohibitions on prepayment). The prepayment restriction is set out in 24 C.F.R. 231.12(a) which provides:

> T he mortgage indebtedness may be prepaid in full and the Department's controls terminated only upon the condition that the Department's prior consent is obtained and upon such terms and conditions as the Department may prescribe. (Emphasis Added.)

Your decision to accept prepayment or to enforce the Regulatory Agreement provision is a highly judgmental decision, not governed by any clear standards. The admission fee may have been a long standing practice in this project and any attempt of enforcing a remedy under the Regulatory Agreement may be more disruptive than beneficial to the provision of elderly housing or may even trigger a mortgage default. The project may be providing decent, safe, and sanitary housing to the elderly on

terms comparable to those in conventionally financed projects with no prohibitions on admission fee.

Because there are no standards and the decision is very judgmental, the decision by the Department whether to enforce Paragraph 9(j) of the Regulatory Agreement, i.e., to take action against the mortgagor, or whether not to enforce the provision, i.e., by accepting prepayment, is an action committed to "agency discretion as a matter of law" and not subject to judicial review. This conclusion is supported by the Supreme Court's holding in Heckler v. Chaney, et al., 470 U.S. 821 (1984); also see U.S. v. Batchelder, 442 U.S. 114, 123-124 (1979); and Vaca v. Sipes, 386 U.S. 171, 182 (1967). In Heckler, the plaintiffs sought to require the Federal Drug Administration ("FDA"), to exercise its discretion to prohibit the use of a drug until the FDA tested the drug and certified that it was "safe for its intended use." The plaintiff asserted that it is the FDA's statutory function to test drugs and determine whether they are safe for their intended use, and that the FDA is required to prohibit the use of the drug until the tests are completed. The FDA refused both to (i) test the drug to determine whether it was safe for its intended use, and (ii) prohibit its use until such test were undertaken.

The Supreme Court held that a federal agency's decision is not subject to judicial review unless the statute, under which the particular action is taken or is not taken, evidences an intention by Congress to subject the agency's decision to review, and further that the statute provides "meaningful standards" for defining the limits of the agency's discretion. Hence, assuming an agency has authority to establish a policy - as does the Department in this matter - an agency's decision not to prosecute or enforce one of its policy directives is a decision committed to an agency's absolute discretion, unless Congress evidenced a contrary intent.

We have reviewed both the statute and regulations and concluded Congress has neither evidenced an intent to restrict the Department's discretion in this matter, nor has Congress established standards for judicial review of the Department's decision.

Furthermore, there is no statutory or regulatory requirement that obligates the Department to enforce or redress a breach of the Regulatory Agreement for the benefit of the tenants of the project. The issue of whether the tenants are third-party beneficiaries of the Regulatory Agreement has been previously litigated and rejected. See the following cases controlling the matter: Falzarano v. United States, 607 F2d. 506, 511 (1979); Harlib v. Lynn, 511 F2d. 51 (1975).

In the Falzarano case, plaintiffs, i.e., the tenants of a subsidized multifamily housing project, brought suit against the Department alleging that the mortgagor, i.e., the landlord, was

using project income for purposes that violated Paragraph 4(b) of the Regulatory Agreement and the Department acquiesced to these "illegal" expenditures. The tenants asserted that they could sue both the Department and the mortgagor because they were third-party beneficiaries of the Regulatory Agreement.

The court rejected this argument stating that tenants may sue as third party beneficiaries of the Regulatory Agreement only if they were the "intended beneficiaries of the document , and not mere incidental beneficiaries." The court found that the Regulatory Agreement did not disclose an intent to benefit tenants, except as they may be incidental beneficiaries, and dismissed the suit against the Department.

In conclusion, you have the discretion to make the decision that you believe to be in the best interests of the Department. If you choose to seek enforcement of the Regulatory Agreement, you should contact Herbert L. Goldblatt, Assistant General Counsel Affirmative Litigation Division, 708-3200.