

Whether Occupancy Hdbk Consistent with HCD Act of 1992

Legal Opinion: GHM-0054

Index: 3.140

Subject: Whether Occupancy Hdbk Consistent with HCD Act of 1992

January 8, 1993

MEMORANDUM FOR: Arthur J. Hill, Assistant Secretary for  
Housing-Federal Housing Commissioner, H

Gordon Mansfield, Assistant Secretary for  
Fair Housing and Equal Opportunity, E

FROM: Frank Keating, General Counsel, G

SUBJECT: The Elderly/Handicapped Mix

The Housing and Community Development Act of 1992 (the "HCD Act") was recently enacted as P.L. 102-550, 106 Stat. 3672 (October 28, 1992). Title VI of this legislation, captioned "Housing for Elderly Persons and Persons with Disabilities," bears directly upon an issue which the Department has looked at closely in the past year in connection with the proposed publication of Chapter 2 of the FHA Occupancy Handbook. That issue is whether owners in FHA Section 236 and 221(d)(3) BMIR projects designed for the elderly may restrict units in such projects to families, where the head of household or spouse is sixty-two years of age or older, and exclude handicapped persons who do not meet the age eligibility requirements. The legal position which I took earlier in the year regarding Chapter 2 was that it was proper, pursuant to statutory authority under the National Housing Act, to so restrict the units. See copy of my earlier opinion, Attachment A.

Section 658 of the HCD Act fully supports that position. Section 658(a) provides that " a n owner of any federally assisted project (or portion of a project) . . . that was designed for occupancy by elderly families may continue to restrict occupancy in such project (or portion) to elderly families . . . ." Section 221(d)(3) BMIR projects and Section 236 projects fit within the definition of the term "project" at Section 683(2) of the HCD Act. The term "elderly families" now is a term unmistakably linked to age and means families whose heads (or their spouses) or whose sole members are at least sixty-two years of age. The term can include two or more persons at least sixty-two years of age living together or one person at least sixty-two years of age living with a person essential to their care or well-being. See Section 683(1) of the HCD Act, cross-referencing Section 621 of the Act which has amended the definition for "elderly family" in Section 3(b)(3) of

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the United States Housing Act of 1937 and made them applicable to Section 221(d)(3) BMIR and Section 236 projects.

It is my view that, in connection with the issues regarding Section 221(d)(3) BMIR and Section 236 projects designed for the elderly, there is no "policy option" that would permit HUD to require owners to admit the non-elderly handicapped to elderly units in these projects. The 1992 legislation affirms the owner's right in such projects to restrict admission. Any attempt by HUD to act otherwise would contravene the position taken by Congress in the HCD Act.

In Chapter 2 of the Occupancy Handbook, the Department has taken the position that owners in HUD's Section 236 and 221(d)(3) BMIR projects designed for the elderly may restrict the units intended for the elderly in such projects to the elderly class and may exclude handicapped persons who do not meet the age eligibility requirements. In light of the HCD Act, I believe there is every reason to proceed with issuance of Chapter 2 with its long-awaited instructions regarding occupancy. Figure 2-1 to such Handbook, Attachment B, establishes criteria for determining whether a project was designed in whole or in part for the elderly. In that regard, owners are first to look at development documentation such as regulatory agreements, loan commitment papers, owner's management plan, etc. If they are satisfied, based upon the development documentation, that the project was designed for the elderly, there is no need to secure HUD field office Housing approval. Otherwise, the owner must assert that the project is for the elderly. The HUD field office then will have to make a determination based upon the totality of circumstances which may include a consideration of bedroom configuration, lease records, and services at the project such as a HUD-approved mandatory meal plan, etc.

I am aware that, in the House Report 102-760 (July 30, 1992), the Committee on Banking, Finance, and Urban Affairs expressed, at p. 141, its intention that the right of owners of projects designed for the elderly to give a preference to elderly persons (i.e., Subtitle D of Title VI) applies "only to projects developed primarily for occupancy by elderly families." The Committee goes on to say that "the housing developer must have expressed his or her intent to create housing for elderly tenants at the time he or she negotiated with HUD for federal financial assistance" and that the "Committee expects the Secretary to issue regulations to that effect." The bill approved by the House only permitted an elderly families preference for what it characterized as a "covered federally assisted housing project . . . designed primarily for occupancy by elderly families." (Emphasis added.) See Section 651 of H.R. 5334 (in the Senate of the United States)(August 11, 1992). Among the universe of projects defined in the bill as "federally assisted housing" of a federally assisted "project" were: (1) Section 236

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projects, (2) Section 221(d)(3) BMIR projects, (3) public housing projects, (4) Section 8 project-based housing, and (5) housing constructed or substantially rehabilitated pursuant to Section 8. Id. at Section 684 of the bill.

At the time of enactment of the bill in the HCD Act, however, the Section 221(d)(3) BMIR projects and Section 236 projects were among the projects pulled out of the general coverage of Subtitle D as well as from the characterization in Section 651 of the House bill triggering such coverage (i.e., "federally assisted housing project . . . designed primarily for occupancy by elderly families"). Instead, the Section 221(d)(3) BMIR and Section 236 projects are now under a sub-caption in Subtitle D, at Section 658 of the HCD Act entitled, "Treatment of Other Federally Assisted Housing." These projects are not governed by the preference and secondary preference procedures in the rest of Subtitle D.1 Congress merely gives such project owners the authority to continue restricting units to the elderly with the term "elderly family" linked to age. Further, the authority to restrict units to the elderly in this "other" category of federally assisted housing is not limited to a class characterized as "projects designed primarily for occupancy by elderly families" as that term was described in the earlier House Report. Instead, the HCD Act refers to "other" housing as a "project (or portion of a project) . . . that was designed for occupancy by elderly families." Thus, the earlier reference in the House Report, which provided that "the housing developer must have expressed his or her intent to create housing for elderly tenants at the time he or she negotiated with HUD for federal financial assistance," does not, by the time of passage of the HCD Act, technically apply to Section 236 or Section 221(d)(3) projects.

I believe the criteria set forth in Figure 2-1 of Chapter 2 of the Occupancy Handbook provide a reasonable basis for a determination as to whether a Section 221(d)(3) BMIR or Section 236 project was, in fact, designed for the elderly. Although, as noted above, the language in the earlier House Report does not technically cover Section 221(d)(3) BMIR or Section 236 projects, we note that the method in Figure 2-1 for determining whether a project was designed for the elderly would substantially accomplish the objective of Congress in connection with projects which ultimately fit within the general coverage of Subtitle D. This objective was presumably to make certain that a

1 See e.g., Section 653 of the HCD Act, where regarding Section 8 projects with a preference for the elderly, if there are not enough elderly families to fill the units, owners may give a preference to disabled families who are near-elderly. The near-elderly concept is not relevant to non-Section 8 FHA projects.

project was intended for the elderly at the time of the development process and, by proceeding with insurance or assistance, HUD ratified such a use for the project. Figure 2-1 is in general accord with this Congressional objective and sets forth the manner by which a project or portion of a project can be deemed for the elderly.

Attachments