

Legal Opinion: GCH-0087

Index: 2.500, 2.800

Subject: Issues Re: Residual Receipts for Section 202/8 Projects

June 11, 1993

NOTE TO: FRANK COVELESKI

THROUGH: MICHAEL REARDON

FROM: VICKIE LONGOSZ

SUBJECT: REMAINING ISSUES RELATING TO RESIDUAL RECEIPTS FOR
SECTION 202/8 PROJECTS

In order to conclude the audit of section 202 management, you have requested our advice on two subjects. First, you asked for the authority for budget-based rents. Under the Regulatory Agreements in use since the inception of the Section 202/8 program, budget-based HAP payments would have been permissible. Paragraphs 3 and 12 (d) of the Regulatory Agreement provides for annual budgeting of expenses including rent increases. Paragraph 12 (e) of the Regulatory Agreement provides that the maximum rent that may be charged for occupancy of an assisted unit shall be in accordance with the provisions of the HAP Contract. Budget-based rents were introduced into the HAP Contract when paragraph 6-20 of Handbook 4571.1 REV 2 (3/83) deleted paragraph 2.7(b) of the HUD-52522-D (8-80) and replaced it with the following:

Contract Rents shall automatically be adjusted whenever a HUD-approved rent increase as provided under the Regulatory Agreement takes effect, and the HUD-approved rents shall become the new Contract Rent.

Section 202/8 projects, which used the amended HAP Contract as described in the Handbook change, and section 202/8 projects, which amend their pre-1980 HAP contracts, are budget-based. Section 202/8 projects which did not amend their pre-1980 HAP contracts use automatic annual adjustment. It should be noted that rent adjustments under sections 8(c)(2)(A) and 8(c)(2)(B) of the United States Housing Act of 1937, whether budget-based or pursuant to annual adjustment factors, are subject to the rent limitation provision of section 8(c)(2)(C), which requires that rent adjustments not materially exceed rents for comparable projects in the same market area. Comparability tests could be used for budget-based projects to verify that the budget-based rent adjustment method does not yield rents which exceed the statutory maximum at section 8(c)(2)(C). I have also attached for your information the Supreme Court's decision in Alpine Ridge/Acacia Village (court agreed with HUD's interpretations re comparability tests).

The second issue you raise is the effect of paragraph 12(f) of the Regulatory Agreement on the requirement of post-1980 HAP contracts for separate residual receipts accounting. Paragraph 12(f) provides that nothing in the Regulatory Agreement shall be construed to relieve the Mortgagor of any

obligation under the HAP Contract. As stated in a memorandum from Robert Kenison for Arthur Hill, dated May 5, 1992, we do not believe that there is any essential incompatibility between the HAP Contract and the Regulatory Agreement concerning deposits of residual receipts since both are controlled accounts (memorandum attached). Since both are HUD-prescribed and required forms, the project owners are entitled to the benefit of any more liberal treatment provided under the Regulatory Agreement form. However, HUD has control over the funds through the requirement for HUD approval of expenditures, and the funds, even though deposited into the Repair and Replacement Reserve, still retain their character as residual receipts. Their ultimate disposition as required under the HAP Contract would not be precluded.

Attachments