

Legal Opinion: GCH-0088

Index: 2.705

Subject: Limitation on Distributions Provision at 24 CFR 883.306

October 27, 1993

Harold Levy, Esq.
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Dear Mr. Levy:

This is in response to your letter of August 18, 1993, in which you request that HUD confirm your opinion that the limitation on distributions provision contained at 24 CFR 883.306 of the "new regulations" does not apply to Shippan Place Apartments. Your request relates to the owner's participation in the Department's Affordable Housing Preservation Program and the ability of the owner to access for purposes of owner distributions funds currently held in the project's Residual Receipts, Operating, and Replacement Reserve accounts.

Your letter indicates that the original Agreement to Enter into a Housing Assistance Payments Contract (AHAP) for the project was executed on September 29, 1978. You further indicate that the AHAP was subsequently amended on April 27, 1979, and again on March 14, 1980. The March 14, 1980 AHAP, which your letter refers to as the Amended AHAP, is said to have the same terms as the original AHAP except for the amount of the maximum housing assistance commitment and the amount of the section 8 contract rent, changes in dates for commencement and completion of work, and the "addition of section 1.7(i), 'Debt-service Vacancy Payments', to the form of HAP Contract, reflecting the language of section 883.204(d) of the [old regulations]". Although seemingly irrelevant to the current issue, we do not see why the construction commencement date would need to be changed in an AHAP amended after such commencement. We also find it somewhat anomalous that although your letter argues that the new regulations do not apply, the change you describe to the HAP contract would seem to indicate that the HAP contract attached to the amended AHAP was a new regulation HAP contract.

The new regulations were effective on February 29, 1980 and contained a provision at section 883.105, Applicability of Revised Regulation, that established to which projects all or a part of the new regulations would apply. The new regulations at section 883.105(a) first provide the general rule of applicability that:

These revised part 883 regulations apply to projects for which the initial application was submitted on or after the effective date. Projects for which applications or proposals were submitted before the effective date will be processed under the regulations and procedures in effect at the date of submission. (Emphasis added.)

Since your letter indicates that the original AHAP was executed on September 29, 1978, there is no other conclusion but that the initial application was submitted prior to the effective date of the new regulations. Therefore, under the general rule of applicability quoted above, Shippan Place Apartments would not be subject to the new regulations. (This assumes that the State Agency did not notify HUD within 60 days of the effective date of the new regulations that they were choosing to have the new regulations apply to this project, as section 883.105(a) allows.)

However, the regulations at section 883.105(b) then address a situation where the application is submitted prior to the effective date of the regulations, but the AHAP is executed after the effective date of the regulations. In such cases, Subparts F and G are made applicable to the project. Based on the representations in your letter, and for purposes of this discussion, we agree that Shippan Place Apartments had an AHAP that was executed prior to the effective date of the new regulations, and therefore, the Amended AHAP executed after the effective date of the regulations would not have subjected the project to Subparts F and G of the new regulations.

Section 883.105(b) goes on further to address situations where the AHAP has already been executed for a project, and the fact that in such cases the parties may agree to make Subparts F and G applicable to such projects. Whether the parties reached any such an agreement is a factual question, the answer to which may be in written agreements among the parties, in actual amendments to the relevant documents, or in a review of the processing for the project. We have undertaken no independent review of files or documentation on this issue.

Section 883.105(b)(2) provides in relevant part that:

Subpart F, dealing with the HAP contract and subpart G, dealing with management, apply to all projects for which an Agreement was not executed before the effective date of these revised regulations. In cases where the Agreement has been executed: the Agency, Owner and HUD may agree to make the revised subpart G applicable (with or without limitation on distributions) and execute appropriate amendments to the Agreement or Contract. (Emphasis added.)

As this synopsis of the applicability of the regulations point out, there are several scenarios under which a project may be subject to all or a portion of the new regulations depending on various factual circumstances and agreements. Your letter specifically requests a determination as to the applicability to Shippan Place Apartments of the limitation on distributions established in section 883.306 of Subpart C of the new regulations. Because the project application was submitted prior to the effective date of the regulations, in order for this provision to be applicable to the project, the State Agency would have had to notify HUD that they were choosing to have the new regulations made applicable to this project and to have modified the application and proposal accordingly. We have no indication that the State Agency made such a determination, and based on your representations, have no reason to believe that such a determination was made by the State Agency, and, therefore, conclude that Subpart C of the regulations, and the limitation on distributions contained in section 883.306, is not applicable to Shippan Place Apartments.

However, we do not believe that this conclusion ends the inquiry. As indicated above, even where the AHAP was executed prior to the effective date of the regulations, the parties may agree to have Subparts F and/or G (which

incorporates the limitations on distributions contained in section 883.306) made applicable to the project. Such an agreement could be evidenced in the several ways discussed above. If there was an agreement of the parties to make Subpart G applicable to the project, even without the limitations on distributions contained in section 883.306, there are certain controls on project funds contained in Subpart G. Subpart G, section 883.702(e) provides in pertinent part that:

Project funds must be used for the benefit of the project, to make required deposits to the replacement reserve in accordance with § 883.703, or to provide distributions to the owner as provided in § 883.306. Any remaining project funds must be deposited with the [State] Agency, other mortgagee, or other Agency-approved depository in an interest-bearing account. Withdrawals from this account may be made only for project purposes and with the approval of the Agency. (Emphasis added.)

To the degree that a limited distribution owner becomes subject to the requirements of Subpart G, the limited distribution owner is subject to the restriction on the residual receipts account that must be established in accordance with the above-quoted provision, regardless of whether the owner is subject to the requirements of section 883.306. That is, the requirement for the establishment of a residual receipts account under section 883.702(e) derives from the fact that the owner is a limited distribution owner. In the case of Shippan Place Apartments, your letter indicates that the owner is such a limited distribution owner and that the State Agency has required the establishment of a residual receipts account. Therefore, if Shippan Place Apartments is subject to Subpart G, and specifically section 883.702(e), then withdrawals from the residual receipts account may be made only for project purposes.

The question then becomes a factual one as to whether the parties agreed in accordance with section 883.105(b) that the project would be subject to Subpart G. Assuming that your representations are correct that there is no evidence in the owner or State Agency files on the project that the parties agreed that the project would be subject to Subpart G requirements, then the controls on the residual receipts account contained in section 883.702(e) are not applicable to Shippan Place Apartments. As indicated earlier, HUD has undertaken no independent investigation to determine whether the facts conform to the representations made in your letter. We would suggest, if you have not done so already, that you confirm your understanding of the underlying facts with the State Agency and the HUD Field Office having jurisdiction over this project.

I trust that this letter addresses your questions. Please feel free to contact Bessie Henderson or me, if you have additional questions or need further information.

Sincerely,

Michael H. Reardon
Assistant General Counsel
Assisted Housing Division