

Election to Acquire Deadline for Coinsured Projects

Legal Opinion: GHM-0076

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Subject: Election to Acquire Deadline for Coinsured Projects

April 8, 1993

John J. Knapp, Esq.  
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1001 Pennsylvania Avenue, N.W., Sixth Floor  
Washington, D.C. 20004

Re: Franciscan Club Apartments  
FHA No. 061-10558

Kentwood Square Apartments  
FHA No. 051-10519  
(601689v/GHM:L-1394)

Dear Mr. Knapp:

This is in response to your letter of December 22, 1992, concerning FHA's curtailment of mortgage note interest in the coinsurance claims benefits for the above-captioned projects due to the failure to obtain extensions of time within which to file an election to acquire the property. You estimate that the curtailment of interest reduced the "adjusted claim" by \$532,536.96 for the Kentwood Square claim and by \$274,727.78 for the Franciscan Club claim. The curtailments were made because the lender did not submit an election to acquire these projects within the 75-day period after the date of default and did not request an extension of time in which to file the election.

You stated in your letter that the curtailments were improper because, notwithstanding the provisions of the coinsurance regulations, FHA did not require or provide a mechanism for making a request for an extension. You claim that it was not FHA's practice to respond to requests for extensions when they were submitted. You also contend that FHA's acceptance of the Monthly Default Status Report without objection constituted an approval of the extension.

The curtailments were proper because York never received a written extension of time and failed to submit its notice of election within the 75-day period as required by the regulations. It is our understanding that extensions of time were not requested with respect to these projects. Therefore, mortgage note interest was curtailed on these projects by the number of days by which the required actions were late.

Section 255.811(a) (24 CFR <sup>1</sup> 255.811(a) (1990)) provides, in part, that a curtailment of interest will not be imposed if the lender complies with section 255.811 and section 255.815:

"To reinstate a defaulted Mortgage, the lender may use one or more of the forms of financial relief described in this section. The lender's efforts to cure a default will not result in a curtailment of interest as provided by <sup>1</sup> 255.821(b) in any subsequent claim for insurance benefits, if the lender complies with conditions set forth in this section and the notice requirements set forth in <sup>11</sup> 255.810 and 255.815. . . ."

Section 255.815 (24 CFR <sup>1</sup> 255.815 (1990)) makes clear that the lender must submit an election to acquire the property and file a claim within 75 days after default or must receive a written extension of time from FHA within which to make an election to acquire the property and file a claim.

Section 255.815 states:

"Unless the Commissioner has given the lender a written extension, the lender must notify the Commissioner of its election to acquire the property and its intention to file a claim for insurance benefits within 75 days of the date of default. The Commissioner will approve an extension of the 75-day deadline if the Commissioner determines that (a) the lender and the Mortgagor are diligently pursuing reinstatement of the Mortgage, and (b) reinstatement of the Mortgage and resolution of the problems that led to the default are feasible."

If the lender does not file its election within the 75-day period or does not receive a written extension, then the mortgage interest is curtailed pursuant to Section 255.821(b) (24 CFR <sup>1</sup> 255.821(b) (1990)) which provides:

"An amount equivalent to Mortgage interest on the unpaid principal balance of the Mortgage on the date the lender initiated foreclosure proceedings or on the date the lender acquired title to the property through deed-in-lieu of foreclosure. This interest will be payable from the date of default to the date of payment of insurance benefits. However, if the lender fails to meet any of the requirements of <sup>11</sup> 255.810, 255.815, 255.816, 255.818(b) or <sup>1</sup> 255.823(b) within the specified time (including any permissible extension of time), the accrual of interest allowance on the cash payment will be curtailed by the number of days by which the required action was late."

You argue that paragraph 10-3a of HUD Handbook 4566.2, "Management, Servicing and Disposition Requirements for Projects with 223(f) Coinsured Loans" and Form 92426 do not require or provide a mechanism for requesting an extension of time within which to make the election to acquire the property. You state that timely submission of Form 92426 reporting the nature and progress of the lender's ongoing efforts to obtain reinstatement of the mortgage was deemed satisfactory compliance with the requirement to request an extension of time. While paragraph 10-3a does not specifically state that a lender must request an extension of time,

section 255.815 does require written approval from the Commissioner for an extension. Paragraph 10-3a does make clear that HUD will make a decision regarding an extension of time. The purpose behind the request for an extension of time, as explained in the Handbook, is to allow HUD to make a decision about whether the lender and mortgagor are working diligently toward reinstatement of the mortgage and that resolution of the problems that led to default are feasible.

The extension requirement in section 255.815 is reiterated in the Monthly Default Status Report (HUD Form 92426) which provides in its instructions that, unless the HUD Field Office approves an extension of time, the lender must submit its notice of election within 75 days after the date of default. Form 92426 also instructs the mortgagee to send an original and one copy to HUD Headquarters, Office of Multifamily Housing Management and one copy of the Form to the HUD Field Office having jurisdiction over the project. The practice has been that mortgagees requesting extensions of time will attach a cover letter requesting the extension of time to the Form. When the Handbook, the instructions on Form 92426 and the regulations are read together, it is clear that a lender must obtain a written extension of time within which to file an election to acquire the property. If York was uncertain about the procedures for requesting an extension of time, York should have sought guidance from the relevant Field Office or Headquarters. In any event, York was, or should have been aware that it had not received a written extension from FHA as required by the regulations, and therefore was required to submit its notice of election within the 75-day period or be subject to curtailment of mortgage note interest until it did file the notice.

Extensions must be requested because HUD will approve an extension only if HUD is convinced that a workout is feasible and is in HUD's best interest. Upon inquiry by lenders, the Director of the Office of Multifamily Housing Management has consistently informed mortgagees that any approvals of extensions of time given by that office will be evidenced in writing. It would be incorrect to assume that an absence of communications in writing is an affirmative response.

Therefore, the curtailments with respect to the above-captioned projects were proper because York neither submitted a request for, nor received a written approval of, an extension of time as required by the regulations.

Very sincerely yours,

John J. Daly  
Associate General Counsel  
Insured Housing and Finance