UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: H. HOUGHTON SMITH, Respondent.	HUDALJ 91-1609-DB(LDP) Decided: June 7, 1991

Douglas J. Centeno, Esquire
For the Respondent

John K. Grisso, Esquire
For the Government

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. Sec. 24.100 et seq. as a result of action taken by Robert E. Lunsford, the Manager of the Birmingham, Alabama, Office of the United States Department of Housing and Urban Development ("the Department," "HUD," or "the Government") on August 29, 1990, and affirmed on October 10, 1990, imposing a twelve-month limited denial of participation ("LDP") upon H. Houghton Smith ("Respondent") and all of his affiliates.[1]

[1]Three affiliates were named in the August 29, 1990, letter giving notice of the LDP: Twin Lakes Community, Inc., LandSouth Homes, and LandSouth Mortgage Co. Respondent complains that the Government violated due process requirements by mailing a notice letter to him c/o LandSouth Homes, but not to LandSouth Mortgage Co. and Twin Lakes Community, Inc. Section 24.711(a) of 24 C.F.R. provides:

> A limited denial of participation shall be initiated by advising a participant or contractor, and any specifically named affiliate, by mail, return receipt

Pursuant to the LDP, Respondent and his affiliates were excluded immediately from "participation in programs administered by the Assistant Secretary for Housing-Federal Housing Commissioner which includes all HUD insured housing programs." The LDP was based on Respondent's alleged failure to divulge an outstanding debt on a certification submitted to the Government in connection with a mortgage insured by the Federal Housing Administration ("HUD-FHA" or "FHA").

On November 5, 1990, Respondent appealed the LDP and requested an oral hearing. After the parties filed responsive pleadings, an oral hearing was held on March 12, 1991, in Birmingham, Alabama. The last brief was filed April 19, 1991.

Findings of Fact

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requested...

It is unclear from this regulation whether separate notices should be mailed to each affiliate. In any event, because all of the affiliates in the instant case received actual notice of the LDP, and because there is nothing in the record to show that the affiliates have suffered actual prejudice because they did not receive separate notices of the LDP through the mail, if the failure of the Government to mail separate notices to each affiliate constitutes error, it is harmless under these circumstances.

1. Respondent, an individual residing in Montgomery, Alabama, has been in the real estate development business for several years. He has extensive experience with HUD programs but has never before been debarred, suspended, or denied participation in any HUD programs. (Tr. 129-30)[2]

2. Twin Lakes Community, Inc., ("Twin Lakes") is an Alabama corporation owning real estate in Montgomery, Alabama. Twin Lakes owns and operates a mobile home project consisting of 309 lots that are leased to owners of mobile homes. Project amenities include a club house, a pool, parking pads, sidewalks, and landscaping. Respondent is a stockholder, director, and president of Twin Lakes. (Tr. 130-132)

3. LandSouth Homes is a real estate contractor owned and operated by Respondent. LandSouth Homes was the general contractor for the Twin Lakes project. (Tr. 131-32)

4. LandSouth Mortgage Corporation ("LandSouth Mortgage") is an Alabama corporation with its principal place of business in Montgomery, Alabama. LandSouth Mortgage is a HUD-FHA approved mortgagee, primarily engaged in the business of brokering FHA and VA residential mortgages. (Tr. 27, 65) At the time of the events out of which this case arose, Respondent was a stockholder, officer, and director of LandSouth Mortgage. (Tr. 71; Rx. 5)

5. In August of 1988, Twin Lakes obtained a $2,694,500 loan from Highland Mortgage Corporation to acquire and develop the Twin Lakes project, secured by a first mortgage on the property. HUD issued a preliminary commitment to Highland Mortgage Corporation to insure the loan upon completion of the project, pursuant to the so-called "Section 207(m)" multi-family housing program. (See 12 U.S.C. 1713) (Tr. 130-31; Gx. 1)

[2]The following reference abbreviations are used in this decision: "Tr." for "Transcript"; "Gx." for "Government's Exhibit"; and "Rx." for "Respondent's Exhibit."

6. Sometime prior to January 31, 1990, Alabama Power Company began installing underground electrical service to some of the 309 lots in the Twin Lakes project pursuant to an agreement with Respondent. Respondent testified that he understood the agreement to require the power company to pay for installation of underground service as a part of an incentive program designed to encourage consumers to conserve their use of electrical power. (Tr. 134-36) After underground electrical service had been installed in about half of the project, the power company ceased installations and billed Twin Lakes for $24,170.07. On January 31, 1990, Respondent was aware of the power company claim but disputed its validity. (Tr. 133-36; Gx. 2)[3]

7. Closing for the permanent loan on the Twin Lakes project occurred on January 31, 1990. (Gx. 1) At closing Respondent, acting as president of Twin Lakes, signed FHA Form No. 2023 entitled, "Request for Final Endorsement of Credit Instrument." That form includes a "Certificate of Mortgagor" addressed to FHA, which reads in part:

> In order to induce the Commissioner to finally endorse the credit instrument for mortgage insurance, and with the intent that the Commissioner rely upon the statements hereinafter set forth, the undersigned makes the following certifications:
>
> 1. That it has received the sum of $__2,430,320.84____ which when added to the final advance will total $__2,694,500.00---- , constituting the full insurable amount of the mortgage for this project.
>
> 2. That construction of the project is substantially complete and is in accordance with the plans and specifications approved by the Federal Housing Commissioner; that said mortgage is a good and valid first lien on the property therein described; that the property is free and clear of all liens other than that of subject mortgage; that all outstanding unpaid obligations contracted by or on behalf of the mortgagor entity directly or indirectly, in connection with the mortgage transaction, the acquisition of the property, or the construction of the project are listed below:

[3] Although the documentary evidence submitted into the record by the Government (Gx. 2) does not explicitly mention Twin Lakes as the debtor, the contents of the document make it clear the bill was generated in connection with the Twin Lakes project. Even if the power company in fact addressed the bill to LandSouth Homes rather than Twin Lakes, that would have no effect on the final outcome of this case, given Respondent's status as owner and operator of LandSouth Homes.

* * *

(b) Due General Contractor		$ 169,150
(c) Other Attorney	$ 2,500	
Cost Certification		4,000

[Gx. 1]

8. FHA Form No. 2023 includes an explicit warning that criminal penalties apply to anyone who knowingly supplies false information to FHA in order to influence an FHA action. (Gx. 1)

9. The FHA Form 2023 signed by Respondent on January 31, 1990, does not reveal the existence of the $24,170.07 disputed power bill from Alabama Power Company. (Gx. 1)

10. Twin Lakes has made no payments on the loan closed on January 31, 1990, and has been in default since March 1, 1990. (Tr. 5 (Stip. No. 2), 125)[4]

11. The Twin Lakes mortgage was assigned to HUD in the spring of 1990 under a claim for insurance by Highland Mortgage Corporation for the original face amount of the mortgage, $2,694,500. (Tr. 5 (Stip. No. 3), 124-25)

Subsidiary Findings and Discussion

An LDP is a type of debarment. The purpose of all debarments is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal Government. 24 C.F.R. Sec. 24.115(a). See also Agan v. Pierce, 576 F. Supp. 257, 261 (N.D. Ga. 1983); Stanko Packing Co., Inc. v. Bergland, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. Joseph Constr. Co. v. Veterans Admin., 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. See 24 C.F.R. Sec. 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. See

[4]Several witnesses, including a Department witness, testified that at the time the Department gave final endorsement to the Twin Lakes project on January 31, 1990, several Department officials were aware that the project was in severe financial distress, that the project would probably not be able to make timely mortgage payments, and that HUD was probably going to have to "take the project back." (Tr. 51-53, 62, 132-33, 137, 154-55) The record does not explain why HUD-FHA agreed to insure the Twin Lakes mortgage under these circumstances.

24 C.F.R. Sec. 24.305; Gonzalez v. Freeman, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. See Shane Meat Co., Inc. v. U.S. Dep't of Defense, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. See Agan, 576 F. Supp. 257; Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense, 726 F. Supp. 278 (D.Colo. 1989).

Cause Exists to Impose an LDP upon Respondent.

Section 24.705 of 24 C.F.R. sets out a long list of causes for issuance of an LDP. Those causes include:

> (2) Irregularities in a participant's or contractor's past performance in a HUD program;
>
> * * *
>
> (7) Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD;
>
> * * *
>
> (9) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee.

The Government has the burden of proof to establish cause for the LDP by adequate evidence. (See 24 C.F.R. Secs. 24.313(b)(3) and (4).) The record shows that Respondent, acting on behalf of Twin Lakes, failed to reveal the existence of a disputed Alabama Power Company claim for work done in connection with the construction of the Twin Lakes project on a written certification submitted to HUD during the closing of a Twin Lakes loan insured by HUD-FHA. However, Respondent contends that the Alabama Power Company claim was discussed orally with HUD officials on January 31, 1990, when they told him he did not have to reveal the claim on the written certification. Respondent also argues that he had no duty to reveal the disputed claim on the written certification because the power company claim arose out of work that was not included in the plans and specifications of the project, and only obligations generated in connection with the plans and specifications were required to be disclosed.

While it is true that the plans and specifications of the Twin Lakes project did not include the facilities necessary to deliver electrical power to each mobile home lot, the certification signed by Respondent on behalf of Twin Lakes as mortgagor nevertheless required disclosure of the power company bill. That certificate reads in part:

> In order to induce the Commissioner to finally endorse the credit instrument for mortgage insurance, and with the intent that the Commissioner rely upon the statements hereinafter set forth, the undersigned makes the following certifications:
>
> * * *
>
> 2. That construction of the project is substantially complete and is in accordance with the plans and specifications approved by the Federal Housing Commissioner; that said mortgage is a good and valid first lien on the property therein described; that the property is free and clear of all liens other than that of subject mortgage; that all outstanding unpaid obligations contracted by or on behalf of the mortgagor entity directly or indirectly, in connection with the mortgage transaction, the acquisition of the property, or the construction of the project are listed below: [Emphasis added]

Paragraph 2 quoted above contains four separate clauses beginning with "that," but only the emphasized part of the final clause directly applies to this case. Respondent argues that the final "that" clause relates back to, and is limited by, the first "that" clause, which speaks of "plans and specifications." That is to say: since the power company bill was not based on construction required by the plans and specifications, it does not fall within the language of the final "that" clause in the certificate quoted above. That argument cannot be credited. There are no cross-references between these four clauses; each is separate, independent, and so complete in itself that it can easily stand alone without loss of meaning. The final "that" clause is a broadly worded "savings" clause intended to sweep in all obligations of whatever sort not covered by the other clauses. Taken as a whole, this certificate clearly is designed to ensure there are no hidden financial obligations of the mortgagor that could potentially undermine the value of the mortgage the Government is being asked to insure. HUD-FHA cannot properly assess the risks of insuring mortgages unless mortgagors provide complete and accurate information about their financial condition, including their debts. Moreover, an obligation does not fall outside the scope of the Certificate of Mortgagor simply because it is disputed. If that were the case, mortgagors could easily circumvent the clear purpose of the certificate by

creating disputes with their creditors solely in order to avoid disclosure of their obligations to HUD-FHA.

Accordingly, I hold that the certificate on its face required Respondent to disclose the power company bill, and, further, that the failure to disclose that bill constitutes cause for issuance of an LDP under 24 C.F.R. Secs. 24.705(2), (7), and (9). Respondent falsely certified in connection with a HUD program (see 24 C.F.R. Sec. 24.705(7)), violated a procedure relating to a final commitment to insure (see 24 C.F.R. Sec. 24.705(9)), and created an "irregularity" in his past performance of a HUD program (see 24 C.F.R. Sec. 24.705(2)).

The Department also has cited as bases for the LDP, 24 C.F.R. Sec. 24.705(4), which reads, "[f]ailure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations", as well as 24 C.F.R. Sec. 24.705(10), which reads, "[m]aking or procuring to be made any false statement for the purpose of influencing in any way an action of the Department." The certificate at issue in this proceeding is not a contract, and the Government has not shown how Respondent has failed to proceed in accordance with a contract or HUD regulations. Similarly, although the certificate was false, the Government has not satisfied its burden to prove that Respondent made the certificate for the purpose of influencing an action of the Department. To be sure, Respondent signed the pre-printed FHA form 2023 that includes the language describing the purpose of the certificate quoted above. Nevertheless, given the controversy surrounding the signing of that form (see discussion infra), the Government has not proved by adequate evidence that Respondent signed the certificate with the intent necessary to satisfy 24 C.F.R. Sec. 24.705(10). Therefore, the record does not show cause for an LDP under 24 C.F.R. Secs. 24.705(4) and (10).

Respondent contends, in effect, that HUD officials orally waived the written requirement on the certificate to disclose the power company bill. That contention is based on the hearing testimony presented under oath by Respondent; by Mr. Joe M. Dawkins, II, a business associate of Respondent who is a lawyer; and by Mr. Malcolm Smith Wadsworth, IV, who did most of the subcontract work on the Twin Lakes project. All three testified that the power company bill for underground electrical service was discussed at the closing that they attended on the afternoon of January 31, 1990, and all three men said, with varying degrees of certainty, that Ms. Kathy Salser, a loan specialist for HUD, brought up the issue. All three witnesses also testified that at the beginning of a rather lengthy discussion regarding escrow items, including underground electrical service, Ms. Salser contended that money would have to be escrowed to cover the cost of installing the underground electrical service, a contention HUD officials allegedly abandoned later during the closing. (Tr. 53-55, 67-68, 138-40) Respondent testified that after discussions regarding the unpaid power company bill and other items the

Government claimed should be escrowed, he specifically asked HUD officials whether it was all right to sign the FHA form 2023, the certificate in the record that does not reveal the existence of the power company claim. According to Respondent, he was told, "It looks fine to me," whereupon he signed the certificate. (Tr. 141)

The testimony of Respondent and his two witnesses was flatly and unequivocally contradicted by three witnesses for the Government: Mr. Robert E. Moore, a HUD lawyer who said he attended most of the closing; Ms. Salser, who attended the closing for only a few minutes; and Mr. George LaFerry, Director of the Housing Development Division in the Birmingham Office of HUD, who testified that he was present during most of the closing. All three Government witnesses denied that the parties discussed establishing an escrow for unpaid underground electrical power facilities. In fact, all three Government witnesses denied that the subject of underground electrical power even came up. (Tr. 11, 18, 32, 36, 92-93, 98, 148-49, 153-54) Although none of the three Government witnesses was present during every minute of the closing, that fact cannot explain why the witnesses presented such radically different versions of what was discussed. The evidence is irreconcilable on its face, and the demeanor of the witnesses did not expose who was testifying untruthfully. Respondent argues that this impasse may be broken by giving greater weight to the "disinterested" testimony of Mr. Wadsworth, who was the subcontractor for most of the Twin Lakes project. As such, he cannot be deemed a "disinterested" witness. Nor can a resolution of the issue be found in a search for inconsistencies and contradictions. The testimony of all six witnesses is essentially equal in that regard, because relatively minor inconsistencies and contradictions may be found in each. In sum, several witnesses apparently have perjured themselves, but their identities cannot be determined on this record.[5]

Respondent contends he failed to disclose the power company bill on the FHA form 2023 certificate in part because HUD officials told him its disclosure was not required. Respondent views this as a mitigating circumstance. (Brief, p. 20) It may also be viewed as an affirmative defense. In either case, the burden of proof rests on Respondent. See 24 C.F.R. Sec. 24.313(b)(4). Assuming, arguendo, that this defense is legitimate in principle, Respondent has not carried his burden to prove the factual basis for it; he has not proved by a preponderance of the evidence that Government officials orally gave him permission to exclude the power bill from the certificate. The evidence is

[5]Neither side has offered a theory to explain why three witnesses for their opposition would commit perjury. For example, the Government has not suggested why Respondent would risk a felony conviction for perjury in the process of defending a relatively minor administrative charge that he did not disclose a debt for $24,107.07 at a time when, according to his unrebutted testimony, he had enough money to cover the debt in escrow. (Tr. 141-42)

in equipoise on the issue.[6] It is therefore unnecessary to reach Respondent's argument that the Government is "estopped to issue the LDP in light of the misleading and dishonest way they obtained his consent to sign the Certificate of Mortgagor." (Brief, p. 21)

Even if Respondent's arguments in defense were credited and the Government's witnesses were all found to have testified untruthfully, Respondent's conduct still would be found irresponsible. The Certificate of Mortgagor includes the following unmistakable admonition under a heading in underlined, boldface type:

WARNING

> U.S. Criminal Code, Section 1010, Title 18, U.S.C., "Federal Housing Administration Transactions", provides in part: "Whoever, for the purpose of...influencing in any way the action of such Administration...makes, passes, utters, or publishes any statement, knowing the same to be false,...shall be fined not more than $5,000 or imprisoned not more than two years, or both."

In the face of potential criminal penalties for failing to disclose all project debts, it would be irresponsible for an experienced businessman seasoned by repeated transactions with the Government to ignore the written requirements of the Certificate of Mortgagor and instead rely upon an oral waiver granted by Government representatives of uncertain authority. A participant who is "presently responsible" would require a written waiver. See Heckler v. Community Health Services, 467 U.S. 51, 65 (1984), reh'g denied, 475 U.S. 1061 (1986).

The Cause Was Sufficiently Serious to Merit Issuance of the LDP, but Mitigating Circumstances Warrant Reducing the Period of the LDP.

Although the record contains adequate evidence of cause to issue an LDP against Respondent, the existence of cause does not necessarily require the Department to issue the LDP. The seriousness of Respondent's conduct and any mitigating factors must be considered. See 24 C.F.R. Secs. 24.115(d), 24.313(b)(3), and 24.700. As acknowledged by Mr. Lunsford, the Office Manager of the Birmingham HUD Office, there are degrees of seriousness in the causes for issuance of an LDP. (Tr. 119-20) For

[6] In addition to the six witnesses who testified at hearing, more than three other individuals were present during the closing: Tony Tate for HUD, Judy Egge for HUD, Susan Hall for Highland Mortgage Company, and unnamed others. (Tr. 137, 147) There is no explanation in the record why these people were not called to testify.

example, conviction for crimes involving moral turpitude such as theft, forgery, bribery, embezzlement, and fraud may serve as the basis for an LDP. See 24 C.F.R. Secs. 24.705(a)(8) and 24.305(a). Respondent's misconduct obviously does not fall in that category of seriousness. Nevertheless, his failure to disclose the power company claim on the Mortgagor's Certificate was sufficiently serious to warrant issuance of an LDP. However, the amount of the undisclosed debt, $24,170.07, is less than one percent of the mortgage, $2,694,500.00. It seems very unlikely that a debt of this size, standing alone, would cause HUD-FHA not to insure the mortgage. In fact, no Government witness testified that knowledge of the power company debt would have precluded approval of the mortgage. Moreover, the Government has not suffered any actual damages as a result of Respondent's misconduct, and, although the parties disagree on this point, if Respondent's arguments are well-founded, the Government may never experience any direct financial loss attributable to Respondent's failure to disclose the power company bill. Respondent argues that the Government will not suffer any damage because, even if the power company reduces its claim to a judgment lien against Twin Lakes, that lien will be subordinate to HUD's already recorded claim against the property under Alabama's "first in time, first in right" rules. The Government did not refute this argument. Respondent also argues that the value and salability of the project have not been diminished by the fact that part of the project has underground electrical service and part does not. The Government disagrees. Because the evidence on this point is inconclusive, it is unclear whether the Government will in fact suffer any significant damages as a result of Respondent's misconduct. Under these circumstances, the cause for issuance of an LDP is less serious than it would be if the misconduct were certain to generate large, quantifiable money damages. In short, the cause was serious but not so serious that Respondent should be placed under an LDP for a whole year, the longest period permitted by law. (See 24 C.F.R. Sec. 24.710(b).)

Respondent had a clean record with the Government until this case, and he cooperated fully with the Government in its investigation. The Government rests its case entirely upon the falsification of a single document in a single transaction out of many real estate transactions Respondent has conducted with the Government during his career. The evidence is strong enough to support issuance of the LDP in the first instance, but there is no creditable evidence in the record upon which to base a finding that Respondent was not "presently responsible" as of the date of the hearing. Extending the LDP beyond that date would make it punitive and hence unlawful. See 24 C.F.R. Sec. 24.115. Accordingly, the temporal scope of the LDP will be affirmed only through March 12, 1991.

The Birmingham, Alabama, Office Manager Had Authority to Issue an LDP against Respondent and All of His Affiliates Except LandSouth Mortgage Co.

Robert E. Lunsford, the Office Manager of the Birmingham, Alabama, HUD office, issued the LDP. Section 24.700 of 24 C.F.R. provides that HUD office managers are "authorized to order a limited denial of participation affecting any participant or contractor and its affiliates except HUD-FHA approved mortgagees." Section 24.105(m) of 24 C.F.R. defines a "participant" as:

> [a]ny person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Respondent is president of Twin Lakes. On January 31, 1990, he acted on behalf of Twin Lakes when (in the language of the regulation) he "committed" Twin Lakes on the FHA Form 2023 "Request for Final Endorsement of Credit Instrument." (Gx. 1) This was a "covered transaction" within the meaning of the regulations (see 24 C.F.R. Sec. 24.110). Twin Lakes is a "participant." Accordingly, Respondent falls within the second half of the definition quoted above as a person who "committed" a "participant" in a covered transaction. Respondent therefore is also a "participant."

When issued, the LDP purported to include within its scope not only Respondent individually but also three affiliates of Respondent: Twin Lakes, a multi-family housing project, LandSouth Homes, a general contractor, and LandSouth Mortgage, a HUD-FHA approved mortgagee. An LDP is an administrative action taken on behalf of the Secretary of the Department, but only the Department's Mortgagee Review Board has been given the power to "exercise all of the authority and perform all of the functions of the Secretary with respect to administrative actions against mortgagees." 24 C.F.R. Sec. 25.2. Furthermore, the clear and unequivocal language of 24 C.F.R. Sec. 24.700 prohibits an office manager of HUD from excluding a HUD-FHA approved mortgagee from participating in HUD-FHA programs. The general language in 24 C.F.R. Sec. 24.710(c) conferring on an office manager the authority to include all known affiliates within the scope of an LDP does not overcome the specifically proscriptive language of 24 C.F.R. Secs. 24.700 and 25.2 excluding HUD-FHA approved mortgagees from the ambit of an office manager's jurisdiction. Mr. Lunsford therefore did not have authority to issue an LDP against LandSouth Mortgage.

Respondent Should Have Been Excluded Only From Participation in the Section 207(m) Multi-family Housing Program.

This case arose out of Respondent's failure on behalf of Twin Lakes to disclose a disputed debt in a written certification submitted to the Department in connection with financing the Twin Lakes project under the Section 207(m) multi-family housing program. Section 24.710 of 24 C.F.R. provides in part:

> (a) The scope of a limited denial of participation shall be as follows:
>
> (1) A limited denial of participation generally extends only to participation in the program under which the cause arose, except: Where it is based on an indictment, conviction, or suspension or debarment by another agency, it need not be based on offenses against HUD and it may apply to all programs.

The first part of 24 C.F.R. Sec. 24.710(a)(1) states the general rule: an LDP covers only the program under which the cause arose. The second part of 24 C.F.R. Sec. 24.710(a)(1) states the exceptions to the general rule, that is, the program scope of an LDP may extend beyond the single program under which the cause arose to include all other programs only in those cases where the cause is evidenced by an indictment or a conviction or by suspension or debarment by another agency.

However, the Government argues, in effect, that there is an additional exception to the general rule located in the second sentence of 24 C.F.R. Sec. 24.710(a)(2). Although not clearly articulated, the thrust of the Government's argument is that that sentence authorizes issuance of an LDP extending beyond the program under which the cause arose to include other programs even though the participant or contractor has not been indicted or convicted by a judicial body or suspended or debarred by another Federal agency.[7] The second sentence of 24 C.F.R. Sec. 24.710(a)(2) states:

[7]The Government poses its argument in a "Motion to Reconsider" an Order issued herein on January 30, 1991. That Order narrowed the scope of the LDP so that Respondent could participate in the Section 203(b) single family housing program *pendente lite*. Although the proper program scope of the LDP is a central issue in this case, the Government's brief filed after the hearing does not mention it.

> "Program" may, in the discretion of the authorized official, include any or all of the functions within the jurisdiction of an Assistant Secretary.

The use of quotation marks around the word "program" indeed seems to refer the reader back to 24 C.F.R. Sec. 24.710(a)(1), the only place the word appears in singular form in the whole of 24 C.F.R. Sec. 24.710 (a). That is to say, the context of the quoted sentence suggests that it was intended to be read as a gloss on the word "program" in 24 C.F.R. Sec. 24.710(a)(1). The next step in the argument, in effect, focuses on the word "functions" in the quoted sentence. The regulations nowhere define "functions," but according to the logic of the Government's argument, it must be read to mean "programs." In other words, the Government would have us read the second sentence in 24 C.F.R. Sec. 24.710(a)(2) as follows:

> "Program" may, in the discretion of the authorized official, include any or all of the programs within the jurisdiction of an Assistant Secretary.

This reading of 24 C.F.R. Sec. 24.710(a)(2) is highly suspect, because it defines "program" in terms of itself, thereby creating a tautology. But even if this provision is interpreted to confer discretionary power upon HUD office managers to depart from the general rule and to expand the program scope of an LDP in every case regardless of the evidentiary basis for the LDP, the record in the instant case does not reveal any basis for departing from the general rule. Mr. Lunsford was not asked at hearing how he exercised his discretion to conclude that the program scope of the LDP issued in this case should extend beyond the program under which the cause arose, and the record elsewhere reveals no reason why the general rule should not apply in this case. A grant of discretionary power to an agency does not include the power to act arbitrarily and without sound reasons. In the words of the United States Court of Appeals for the Fourth Circuit, "discretion to decide does not include a right to act perfunctorily or arbitrarily." Ely v. Velde, 451 F.2d 1130, 1138-1139 (4th Cir. 1971), quoted with approval in Appalachian Power Co. v. Environmental Pro. Agcy., 477 F.2d 495 (4th Cir. 1973). In the absence of any apparent explanation for the departure from the general rule, I must conclude that it was an abuse of discretion to prohibit Respondent from engaging in all programs under the jurisdiction of the Assistant Secretary for Housing-Federal Housing Commissioner when the cause arose only under the Section 207(m) multi-family housing program.[8]

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[8]The Department could have sought to exclude Respondent from participating in *all* HUD programs only through a debarment or suspension proceeding initiated by central office HUD officials.

On January 30, 1991, an Order was issued herein granting Respondent's pro se request to narrow the scope of the LDP so as to permit Respondent d/b/a LandSouth Homes to participate "in the single family 203(b) program until such time as the Administrative Law Judge can rule in this case." This Order was based on Respondent's representation that counsel for the Government had stated the Government did not object to Respondent's request.

After the March 12, 1991, oral hearing based on the issues raised by the Complaint and Answer, on March 22, 1991, Respondent filed a "Motion to Show Cause Why Birmingham HUD Officials Should Not Be Held in Contempt of Court" that alleges Department officials violated the January 30, 1991, Order by refusing after January 30, 1991, to allow Respondent to participate in the Section 203(b) single family program. Four days later, on March 26, 1991, counsel for the Government filed a motion to reconsider the January 30, 1991, Order asserting, in effect, that the Government never consented to it.

As Administrative Law Judges do not have authority under the rules of procedure governing debarment proceedings (24 C.F.R. Sec. 26.1 et seq.) to issue contempt citations against HUD officials, Respondent's motion was denied on March 29, 1991. However, because Respondent's March 22 motion and the Government's March 26 response raised serious issues regarding the integrity of the adjudicatory process, the parties were ordered on March 29, 1991, to file affidavits setting out their respective versions of the pertinent facts surrounding issuance of the January 30, 1991, Order. The affidavits have been filed as ordered, but they do not resolve the issues. Accordingly, copies of this decision and the affidavits have been forwarded to the Office of the Inspector General of the Department with a recommendation for further investigation and action as deemed appropriate.

The Government's Motion to Reconsider the January 30, 1991, Order will be denied because, for the reasons discussed supra, the LDP improperly excluded Respondent from participating in the Section 203(b) single family housing program.

Conclusion and Determination

Upon consideration of the entire record in this matter, I conclude and determine that good cause existed for the Birmingham, Alabama, office of HUD to impose upon Respondent a limited denial of participation prohibiting Respondent from participating in the Section 207(m) multi-family housing program for the period beginning August 29, 1990, and ending March 12, 1991.

The Government's Motion to Reconsider the January 30, 1991, Order issued herein is hereby ORDERED denied.

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THOMAS C. HEINZ
Administrative Law Judge

Dated: June 7, 1991