

Legal Opinion: GCH-0004

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Subject: Homeownership, Modernization (CIAP and Comp. Grant)

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MEMORANDUM FOR: Frank Keating, General Counsel, G

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SUBJECT: Eligibility of Homeownership Projects for CIAP and
Comprehensive Grant Modernization Funds under
Section 14 of the United States Housing Act of 1937

In the development of the final rule for the Comprehensive Grant Program (CGP), the Office of Public and Indian Housing (PIH) has raised several issues regarding the eligibility of Turnkey III and Mutual Help homeownership projects for CIAP and CGP funds. We have provided the following responses to PIH and Assistant Secretary Joseph Schiff has requested that you review our advice on these issues.

1. Issue: Is HUD authorized under section 14 to provide PHAs and IHAs with CIAP funds to modernize Turnkey III and Mutual Help homeownership projects?

Response: Yes, section 14(i)(1)(D) and (E) authorizes the use of CIAP funds for limited physical and management improvements for homeownership projects. In addition, section 516 of the National Affordable Housing Act (NAHA) expressly authorizes an IHA to use CIAP funds to comprehensively modernize its Mutual Help projects (or units within a project) using "a single grant." However, there is no statutory authority for a PHA or IHA to comprehensively modernize its vacant or non-homebuyer-occupied Turnkey III units.

Analysis: Modernization funds under section 14 are intended to be used for low-rent public housing projects, as evidenced by section 14(b)(1) which states that:

" The Secretary may make available ... financial assistance...to public housing agencies for the purpose of improving the physical condition of existing low-rent public housing projects and for upgrading the management and operation of such projects to the extent necessary to maintain such physical improvements." (Emphasis added.)

This premise is substantiated further by section 14(c)(2), which states that assistance under subsection (b) (quoted above) "may be made available only for low-rent housing projects which...are operated as rental housing projects and assisted

under section 5 or section 9 of this Act." (Emphasis added.)
Read together, these provisions restrict the use of modernization funds under section 14 to rental housing projects and, to the extent that a homeownership project is viewed not to be a rental housing project, these provisions would effectively prohibit the use of modernization funds for homeownership projects.

Nevertheless, in the CIAP program only, there is a limited exception to the general rule that modernization funds can only be used for rental housing projects. This exception is contained in section 14(i)(1), and states:

(i)(1) In addition to assistance made available under subsection (b) of this section to a public housing agency that owns or operates fewer than 500 public housing dwelling units i.e., to a PHA under the CIAP modernization program, the Secretary may, without regard to the requirements of subsection (c),(d), (f), (g), or (h) of this section, make available...financial assistance...in an amount which the Secretary determines is necessary to meet emergency or special purpose needs, especially emergency and special purpose needs which relate to fire safety standards. Such needs shall be limited to:

.....

(C) correcting conditions which threaten the health or safety of the occupants of any low-income housing project not described in subsection (c) of this section and not assisted pursuant to section 8;

(D) (i) physical improvement needs which (I) would not otherwise be eligible for assistance under this section, and (II) pertain to any low-income housing project other than a project assisted under section 8;

(ii) physical improvement needs eligible under this subparagraph shall include replacing or repairing major equipment systems or structural elements, upgrading security, increasing accessibility for elderly families and handicapped families ...reducing the number of vacant sub-standard units, and increasing the energy efficiency of the units, except that the

Secretary may make financial assistance available under this clause only if the Secretary determines that the physical improvements are necessary and sufficient to extend substantially the useful life of the project;

(Emphasis added.)

The Secretary has been cautioned in assisting homeownership projects with CIAP. House Report 96-979, accompanying the Housing and Community Development Act of 1980, dated May 15, 1980, page 26, indicates:

The new program permits assistance to be made under this separate process to PHAs for the purpose of improvements to units assisted under the section 23 Leased Housing Program, the Turnkey Homeownership Program, the Mutual Self-Help Program, and the Indian and Alaskan Native Public Housing Programs. The Committee directs the Secretary to proceed cautiously in this regard, and to carefully consider not only the unique needs of these forms of assisted housing, but the particular conditions of ownership in each situation. For example, while the responsibility for making improvements to those units which are owned by the PHA would generally be with the PHA and HUD, the Secretary should assess the extent to which the tenant has contributed in part or in whole to the problem being addressed prior to awarding assistance under this program.

HUD used section 14(i)(1)(D) as the statutory authority to promulgate regulations in the CIAP program which permit a PHA or IHA to carry out limited physical improvements in homeownership projects. This regulatory language is codified at 24 CFR 968.205(f), and states that:

(f) Homeownership projects. For homeownership projects only, eligible physical improvements are limited to work items that are not the responsibility of the homebuyer families and that are related to health and safety, correction of development deficiencies, physical accessibility, and cost-effective energy conservation measures. Nonroutine maintenance or replacements, additions, items that are the responsibility of the homebuyer

families, and management improvements are not eligible modernization costs for homeownership projects. (Emphasis added.)

Recently, section 509(d) of the NAHA amended section 14(i)(1) by adding a new paragraph (E) to the list of limited activities that may be undertaken "without regard to the requirements of subsection (c)..." (i.e., without regard, among other things, to the requirement that modernization be limited to rental housing projects). This provision authorizes the use of CIAP funds for special purpose management modernization activities, as follows:

(E) management improvement needs which (i) would

not otherwise be eligible for assistance under this section, and (ii) pertain to any low-income housing project other than a project assisted under section 8.

Thus, at the present time, HUD is authorized to provide CIAP funds to a PHA or IHA to carry out the following special purpose modernization activities in its homeownership projects: (1) limited physical improvements pursuant to section 14(i)(1)(D); and (2) management modernization activities under section 14(i)(1)(E). PIH must decide from a policy standpoint, however, whether to implement section 14(i)(1)(E) with respect to homeownership projects. If it intends to do so, PIH will need to remove the regulatory impediment which currently prohibits the use of CIAP funds to carry out management improvements in homeownership projects. (See the last sentence of 968.205(f), quoted above.) Additionally, PIH has requested our guidance regarding whether kitchen and bathroom replacements could be funded using special purpose modernization. We agree that these replacements could be accomplished with special purpose modernization, and agreed to redraft the special purpose modernization definition in § 968.203 as part of the CGP final rule.

However, because of the limited nature of the improvements authorized by section 14(i)(1)(D) and (E), it does not appear that HUD has the authority to provide CIAP funds to a PHA or IHA to comprehensively modernize its vacant or non-homebuyer-occupied units under the Turnkey III program, as proposed at § 968.205(f)(2) of HUD's April 26, 1991 rule (see 56 FR 19434, 19482). (See, also, the analogous provision for the Indian Housing program at § 905.615(f)(3); 56 FR 19469.)

HUD clearly has the authority, however, under section 516 of the NAHA (which amends section 202(b) of the United States Housing Act of 1937) to provide assistance to an IHA in the form

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of a "single grant" for the purpose of comprehensively modernizing a Mutual Help project (or unit within a project).

2. Issue: Is HUD authorized under section 14 to provide PHAs and IHAs with CGP funds to modernize Turnkey III and Mutual Help homeownership projects?

Response: Yes, section 14(k)(2)(D)(i) implicitly authorizes HUD to provide PHAs and IHAs with CGP funds to modernize Turnkey III or Mutual Help homeownership projects. However, since OGC has construed section 516 of the NAHA to apply not only to the CIAP program, but also to the CGP program, HUD has express authority under that section to permit an IHA to use no more than a "single grant" for the purpose of comprehensively modernizing (with CGP or CIAP funds depending on the size of the IHA) its Mutual Help projects (or units within a project).

Analysis: In the CIAP program, section 14(i)(1)

expressly authorizes a PHA to use modernization funds for limited physical and management improvements, notwithstanding the requirements of section 14(b) and (c), which otherwise limits modernization assistance to rental housing projects. However, there is no comparable language in the CGP program which removes the statutory impediment raised by section 14(b) and (c).

As a result, it would appear that HUD did not have the statutory authority to propose in its April 1991 rule that CGP funds could be used for limited physical improvements (see § 905.666(b)(1) and 968.310(b)(1) at 56 FR 19470 and 19484, respectively), or for the one-time comprehensive modernization of a vacant or non-homebuyer-occupied Turnkey III unit (see 905.666(b)(3) and 968.310(b)(2) at 56 FR 19470 and 19485, respectively).

Nevertheless, because section 516 of the NAHA has been construed to apply to both the CIAP and CGP modernization programs under section 14, HUD was expressly authorized to propose in its April 1991 rule that an IHA under the CGP program could use no more than a "single grant" to comprehensively modernize a Mutual Help project (or unit within a project). (See, 905.666(b)(2) at 56 FR 19470.)

It could be argued, however, that despite the limitation under section 14(b) and (c) which generally restricts the use of modernization funds to rental housing projects, section 14(k)(2)(D)(i) overcomes this obstacle by implicitly authorizing the use of modernization funds for homeownership projects. This section establishes the method for counting public housing units, not only to determine the threshold for participation under the CGP program, but also to assess the relative modernization needs

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of PHAs and IHAs under the CIAP and CGP programs, and provides specifically that:

In determining how many units an agency owns or operates and the relative modernization needs of agencies, the Secretary shall count each existing unit under the annual contributions contract, except that an existing unit under the turnkey III and Mutual Help programs may be counted as less than one unit, to take into account the responsibility of families for the costs of certain maintenance and repair....
(Emphasis added.)

This language certainly raises a question as to why the formula, which is intended to assess the relative modernization needs of PHAs and IHAs under the CIAP and CGP programs, would affirmatively count (to a greater or lesser extent) the number of homeownership units owned or operated by a PHA or IHA. In the CGP program, the number of units owned or operated by a housing authority will directly affect the amount of modernization assistance it receives under the formula. The legislative

history does not offer any explanation for why Congress would provide additional assistance to a PHA or IHA on behalf of its homeownership units, and then prohibit the use of such assistance for those same units.

We conclude that the best reading of these authorities and which does not require any further legislative amendment is to construe section 14(k)(2)(D)(i) as implicitly authorizing the use of CGP modernization assistance for homeownership projects, notwithstanding section 14(b) and (c).