

Legal Opinion: GCH-0011

Index: 2.900, 2.920
Subject: HUD's Recognition of Developer's Fee

November 12, 1991

MEMORANDUM FOR: Michael A. Levine, Acting Director
Development Grant Division, HMED

FROM: Michael H. Reardon, Assistant General Counsel
Assisted Housing Division, GCH

SUBJECT: HUD's Recognition of a Developer's Fee for Woodland
Hills Housing Development, Kalamazoo, Michigan

This responds to your request for an opinion regarding HUD's instructions in Notice 89-28 and section 17(d)10 of the United States Housing Act of 1937 (the Act), as amended.

I assume from the facts of your memorandum and a subsequent conversation that you had with Bessie Henderson of my staff, that your questions are (1) whether you can include the developer's fee in the development cost of a project that received notice of selection on September 30, 1989 and (2) whether Notice HUD-89-28 that permits the project owner to receive a developer's fee from the State agency mortgage loan complies with the Act?

Section 17(d)10 of the Act states:

- (A) The Secretary shall include in the development cost of a project assisted under this subsection any developer's fee if such fee --
 - (i) is included in a mortgage secured by the project; and
 - (ii) the lender is a State housing finance agency or the project is financed by bonds issued by a State housing finance agency or similar local entity.
- (B) The amount of any developer's fee shall not be counted in calculating the maximum grant amount pursuant to paragraph (4)(b).
- (C) This paragraph shall only be applicable to projects with respect to which a notice of project selection is received before the date of the enactment of the Housing and

We interpret this language to provide that the Secretary is required to include the developer's fee in the development cost of the project if the notice of project selection was received before February 5, 1988. In the absence of any other statutory provision addressing this issue, the implication is that for those projects that received a notice of project selection subsequent to February 5, 1988, the developer's fee cannot be included in the development cost. In this case, the notice of project selection was received after February 5, 1988, therefore, the developer's fee cannot be included in the development cost of the project.

With respect to whether Notice HUD-89-28 that permits the project owner to receive a developer's fee from the State agency mortgage loan complies with the Act, the Notice provides:

Developer's fees . . . may be included if included in a mortgage secured by the project and if the lender is a State housing finance agency or the project is financed by bonds issued by a State housing finance agency or similar local entity.

This provision does not violate the statute because the statute neither permits nor prohibits the developer's fee to be included in the mortgage, rather it provides that the developer's fee will be included in the development cost of the project if the fee is already included in the mortgage. It is within the discretion of your office to allow the developer's fee to be financed in the mortgage. If the developer's fee is included in the mortgage, then the statute requires the Secretary to include the developer's fee in the development cost of the project if the other requirements of the paragraph are met. However, as stated above, since the notice of project selection was received after February 5, 1988, the developer's fee cannot be included in the development cost of the project whether or not it is included in the mortgage secured by the project.