Legal Opinion: GCH-0075

Index: 2.800
Subject: First Amendment Issues in Section 202 Project

June 28, 1993

MEMORANDUM FOR: Raymond C. Buday, Jr., Regional Counsel, 4G

FROM: Robert S. Kenison, Associate General Counsel
Office of Assisted Housing and Community Development, GC

SUBJECT: First Amendment Issues in Section 202 Project

We apologize for the delay in responding to your November 23, 1992, memorandum concerning complaints of unequal treatment made by some tenants of a section 202/8 elderly housing project, Shalom Towers, located in Louisville, Kentucky. Eighteen tenants of this project submitted to the Louisville, HUD Office a list of concerns which they believe "come under some type of discrimination." A nineteenth tenant wrote Senator Mitch McConnell raising similar issues; Senator McConnell wrote the HUD Louisville Office asking that these concerns be addressed.

You request "a written legal opinion concerning the legality under the First Amendment to the United States Constitution of the maintenance of an exclusively kosher kitchen in a section 202 funded housing project, and the prohibition of certain recreational activities in the project from sundown Friday to sundown Saturday." This request is accompanied by an opinion of your office provided to the Atlanta FHEO Division that neither of the policies violates the First Amendment and that the implementation of these policies has no Fair Housing Act implications.

With respect to the kosher kitchen issue, Sharon Mizell, until recently Chief of the section 202 Loan Branch, indicated that she had inquired into the issues raised and was advised that maintenance of the community room kitchen as a kosher kitchen would preclude its use by those tenants who do not follow the kosher dietary rules in food preparation. She advised the Regional Office that the kitchen was provided by HUD to serve all the tenants without regard to religious dietary restrictions, and that, if Shalom Towers wants a kosher kitchen that would not be equally available to all the tenants to prepare food of their choice, they would have to install a separate kosher kitchen with non-HUD funds. We agree with this solution but would not rule out joint kosher and nonkosher use, should this be feasible.

Although the extent of restriction of recreational activities is not entirely clear, we do not agree with the conclusion you have reached that restriction of the tenants' recreational activities in project space on the Jewish Sabbath does not violate the First Amendment. We believe that the Maryland Sunday closing law case, McGowan v. Maryland, 366 US 420 (1961), on which your opinion principally relies, is inapposite. As stated in that decision, the Sunday closing laws serve a secular purpose of providing a day for rest and recreation, when people may recover from the labors of the week. The opinion cites a long list of activities that are not prohibited, including

purchases of groceries, tobacco, sweets, gas and oil; attendance at bathing beaches and amusement parks, and more recently, including Sunday sale of alcoholic beverages, playing bingo and pinball machines, all calculated to make the day more enjoyable. The Sunday closing laws have been upheld based on the secular public welfare interest of providing a nonwork day; the restriction on recreational activities serves no such interest and has an obvious exclusively religious context. Further, a nonprofit owner of a Federally subsidized housing project has no such mandate to regulate the lives of its tenants, but is limited to those restrictions reasonably related to the landlord-tenant relationship.

Since you have cited McGowan to support the Saturday restriction on activities, we suggest that comparison of a more recent case, Estate of Thornton v. Caldor, Inc., 472 US 703 (l985) may be instructive. The Court in this case struck down a Connecticut statute providing that no person who states that a particular day is his Sabbath may be required by his employer to work on that day, or be dismissed for failure to do so. The Court held that this law violated the Establishment Clause since the State had commanded that Sabbath religious observances automatically control secular interests at the work place, without regard to inconvenience to the employer or to other employees. It further found excessive entanglement in the necessity for a State mediation board to determine which religious activities may be characterized as observance of the Sabbath. The Court cited with approval the following statement made by Judge Learnad Hand in Otten v. Baltimore and Ohio R. Co., 295 F2d 58, 61 (CA 2 1953): "The First Amendment . . . gives to no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." See also, Nuechterlein, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L.J. 1127, 1141 (1990).

The reliance upon the Lynch and Allegheny cases is misplaced, since this case is not about decoration. The analysis of Lemon flowing from these two cases is thus also flawed. Further, we believe that the application of the "three part test" articulated in the Lemon case needs to be applied in the light of the purposes clause limitations required by HUD with respect to the corporate articles of owners of section 202 projects. Attached is a March 26, 1976, legal opinion provided to the Office of Housing by then Associate Deputy General Counsel Diana Stoppello, in regard to the eligibility of the Salvation Army, a branch of the Christian church, to receive a section 202 loan. The purposes clause of section 202 borrower corporations is strictly limited to providing housing and services designed to meet the needs of elderly persons and cannot include references to religion or to religious purposes. The activities of the corporation must be within its secular purposes, although religious activities desired by the tenant body may be conducted in multipurpose rooms, so long as all reasonable requests from all faiths are honored.

We are concerned that the combined circumstances of the exclusive use of the community room on weekends for Jewish religious activities coupled with the limitations on other activities by tenants in the public spaces may, indeed, serve the impermissible purpose of advancing religion and excessively entangling the Government. We particularly note that nineteen tenants were willing to risk the displeasure of the management in objecting to these arrangements and the statement in the petition that "others would have signed but are afraid of loosing (sic) their apartments."

In the attached April 12, 1993 opinion, Associate General Counsel Wilson

and Assistant General Counsel Carey do not agree that there are no fair housing issues. Their opinion raises issues in this context concerning reference by the management to the project as a "Jewish building," denial of use of the kitchen to tenants not following kosher practices, and limiting use of residents' funds for food purchases to kosher food.

Attachments