Legal Opinion: GCH-0077

Index: 2.600
Subject: Budget-Based Section 8 Rents

August 30, 1993

MEMORANDUM FOR: Donald A. Kaplan, Director
Office of Evaluation, HFE

FROM: Robert S. Kenison, Associate General Counsel
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SUBJECT: Request for Opinion: Budget-Based Section 8 Rents

This is in response to your request for an opinion regarding whether HUD currently has statutory authority to issue regulations to implement budget-based contract rent adjustments for Section 8 assisted projects that receive rent adjustments based on the automatic annual adjustment factor (AAAF). In addition, you want our views on the potential need to obtain owner consent in changing to a budget-based system.

BACKGROUND

Section 8(2)(c)(2)(A) of the United States Housing Act of 1937 provides that "the assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." The statute does not prescribe the method to be used to calculate the rent adjustments (i.e., budget-based v. AAAF). The method used to calculate rent adjustments is provided in the HAP Contract and in the regulations.

Section 1.9 (b)(2) of the HAP Contract dated 6/76, provides:

On each anniversary date of the Contract, Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

The HAP Contract is a legally binding contractual agreement between the contract administrator and the owner of the project. The consent of the parties to the HAP Contract is required in order to change from AAAF to budget-based contract rent adjustments where the Contract specifically prescribes that rents will be adjusted based on the AAAF.

In our opinion to you dated May 4, 1993, we concluded that HUD cannot issue regulations to require State HFAs that have already entered into Refunding Agreements with HUD to apply the AAAF retroactively to a rent figure that would have resulted had the ACC, HAP Contract and

mortgage been amended. The basis for that conclusion was the Supreme Court ruling in Lynch v. U.S., 292 U.S. 571 (1934), which held that the United States cannot abrogate contractual rights to reduce expenditures. The Lynch analysis appears to apply equally to the instant case where HUD seeks to change the terms of an existing HAP Contract. HUD cannot alter an existing contract unilaterally, at least in the absence of an overriding legal rationale and we have been unable to identify one.

The method to be used to calculate the rents for projects whose HAP Contract was the 8/80 version is specified in the regulations. Section 2.7(b) of the HAP Contract dated 8/80 provides that Contract Rents will be adjusted on the anniversary date of the Contract in accordance with 24 CFR Part 888. Part 888 provides that AAAFs are used to adjust rents under the Section 8 program. To change from AAAF to budget-based contract rent adjustments for projects that are subject to the HAP Contract dated 8/80 would require a change to the regulations. Although, upon occasion, such a contract provision will state that the particular provision is subject to the regulations, as amended, the section 8 contract provision on adjustments does not so provide. Therefore, HUD cannot make the argument that the owner agreed at the outset of the contract to be bound by subsequent changes in the regulation.

In order to affect current HAP Contracts, a change to the regulation requiring that rent adjustments be budget-based rather than pursuant to AAAF would have to be applied retroactively. We note, however, that courts look with disfavor upon retroactive administrative rulemaking. In Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), the Court stated:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant. (Emphasis added.)

Recent experience demonstrates that the Congress also acts vigilantly to impede retroactive application. In 1987, Congress enacted Section 142(d) of the Housing and Community Development Act which prohibits the reduction of Contract Rents in effect on or after April 15, 1987, "unless the project has been refinanced in a manner that reduces the periodic payments of the owner." This provision was enacted by Congress to specifically prohibit HUD from retroactively reducing an owner's HAP contract rents, with the only exception being where a refinancing reduced the owner's debt service payments.

It is our understanding that in certain Housing programs (e.g., Section 202, Loan Management Set-Aside), it has been Housing's policy to require that projects be converted from AAAF to budget-based contract rent adjustments when the owner of the project seeks a benefit from HUD. Since both parties mutually agree to the revision of the contract on new terms, no problem of retroactivity ensues.

CONCLUSION

HUD does have the statutory authority to implement regulations to change from AAAF to budget-based contract rent adjustments where the rents are adjusted based on the regulations and not the Contract. However, the rationale of Bowen would appear to prevent changes to the regulations from being applied retroactively. As noted above, any regulations that HUD issues could not impair the rights of the parties to an existing contract, in the absence of an overriding legal rationale. Consequently, any changes to the regulations would affect only future contracts. In light of the fact that the Section 8 new construction program was abolished by statute in 1981, HUD does not have the authority to enter into any new HAP Contracts unless specifically authorized by Congress. However, if the owner seeks a benefit from HUD beyond that which the original contract entails, HUD is not statutorily prohibited from requiring that the adjustment to contract rents be changed from AAAF to budget-based.