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8/4/86 - Dan - I don't know if you're serious yet - HUD can't take part of 2 of in on the 3rd situation in Berkeley - Gordon, Alex Alford / should be - Gaypowski 8178



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE GENERAL COUNSEL

JUN - 6 1986

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MEMORANDUM FOR: Gerald J. Benoit, Director Existing Housing Branch, HMAE

FROM: *for Steven L. Belio* Joseph F. Gelletich, Assistant General Counsel Assisted Housing Division, GCH

SUBJECT: Section 8 Certificate Program: Rent: Determination of Comparability in Rent Controlled Market (Berkeley, California)

Background

The San Francisco RA asked (memorandum of April 22, 1986) for guidance on how to determine rent reasonableness in a rent controlled market. In Berkeley, most non-Section 8 rental units are subject to stringent rent control. Units assisted under Section 8 are not under rent control. 1/

A RIGA report (Finding #3) objects to using other Section 8 assisted units as comparables in establishing Certificate Program rents. RIGA claims that because of this procedure Section 8 contract rents were substantially higher than rents for comparable units in the private unassisted market. 2/

Section 882.106(b)(1)(i) provides that contract rent must be "reasonable in relation to rents . . . in the private unassisted market" 3/ Section 882.106(b)(2) provides that:

1. Our characterization of the Berkeley ordinance is based on the material received from the RA. We have not examined the ordinance.
2. The RIGA finding does not say there was any difference between the PHA's comparability procedures for determination of initial contract rent or for adjustment of contract rent. HUD regulations define comparability in the same way for both purposes (see § 882.108(b)) (although comparability is a statutory requirement only for adjustments (U.S.H. Act of 1937, section 8(c)(2)(C)).
3. In addition, initial contract rent may not exceed the owner's rents "for comparable unassisted units" (§ 882.106(b)(1)(ii)). Adjustments may not "result in material

(continued)

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"for a rent controlled unit, comparable units shall be those which are rent controlled; for a unit which is not subject to rent control, comparable units shall be those which are not rent controlled."

Under the Berkeley ordinance, "a unit apparently passes out of rent control for the duration of the assisted occupancy." The PHA argues (summary in RA memorandum) that a Section 8 unit is not rent controlled and the PHA must use non-controlled units -- i.e., other Section 8 assisted units -- as comparables. The PHA contends that in local circumstances section 882.106(b)(2) (requiring use of comparables which are not rent controlled) should take precedence over section 882.106(b)(1) (requiring that Section 8 rents may not exceed rents for comparable unassisted units).

Opinion

Determination of the comparable rent for a unit to be assisted under the Certificate Program requires that the subject unit is to be valued as if rented on the private unassisted market.⁴ The purpose of the comparability analysis is to determine the amount for which the unit could be rented by the owner on the unassisted market if not rented to a Section 8 participant. When a Section 8 participant wants to rent a unit, in principle the owner has the choice of renting to the assisted family or to another tenant at an unassisted market rental. The comparability test is intended to allow the Section 8 rent to go as high as, but no higher than, the amount the owner could get for a private unassisted rental of the unit.

For this purpose, the rule requires the PHA to use rents of "comparable units in the private unassisted market." The rent of such private unassisted units is the best indicator of the market rental of the subject unit for the same purpose. (In applying the comparability test as a limit on adjustments, the use of "comparable unassisted units" is a statutory requirement.) The use by a PHA of rents paid for Section 8 assisted units in establishing comparability is a plain violation of the regulatory requirement to use amounts charged for units in the private unassisted market.

Section 882.106(b)(2) requires the PHA to use rent controlled units as comparables for a rent controlled assisted unit, and non-rent controlled units as comparables for a non-

differences between the rents charged for assisted and comparable (as defined in § 882.106(b)) unassisted units" (§882.108(b)).

4. Stated in terms of appraisal jargon, rent for the assisted unit is to be based on "highest and best use" as a private unassisted residential rental unit.

rent-controlled assisted unit. This provision does not override the regulatory objective to value the unit as if rented on the private unassisted market, or the requirement to use unassisted rentals for this purpose. Rather, section 882.106(b)(2) is intended to carry out this broad objective in the context of a market with rent control. If a unit as rented in the private unassisted market is subject to rent control, then rents of comparable rent controlled units are the best indicator of unassisted private market rental for the unit. If a unit as rented in the private unassisted market is not subject to rent control, then rents paid for comparable non-rent controlled units are the best indicator of unassisted private market rental for the unit.

In the context of the Berkeley ordinance, absent rental under Section 8, a unit would be subject to rent control if rented in the private unassisted market. Therefore the unit should be considered a rent controlled unit for the purpose of applying the requirement of section 882.106(b)(2). The question to be answered in the comparability determination is the same in a rent control jurisdiction as elsewhere: what is the rent the owner could have charged on the private market? If the unit would have been rent-controlled on the private market, section 882.106(b)(2) requires the use of rent controlled units as comparables (even though the unit will not be subject to rent control during the term of the assisted rental).

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