MEMORANDUM FOR: Gerald J. Benoit, Director Existing Housing
Branch, HMAE
FROM: Joseph F. Gelfetich, Assistant General Counsel
Assisted Housing Division, CHH
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.

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.

Section 882.106(b)(1)(i) provides that contract rent must be "reasonable in relation to rents ... in the private unassisted market ..." 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 comparability procedures for determination of initial contract rent or for adjustment of contract rents. HUD regulations define comparability in the same way for both purposes (see § 882.109(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 market..."
"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. The purpose of the comparability analysis is to determine the amount for which the unit would 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-

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 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, under Section 4.1, a unit "would be subjected 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 as in a rent
control jurisdiction as elsewhere: what is the rent the owner
would have charged on the private market? And 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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GCH: Ballis Ext. 755-5470
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