

Drug-Free Housing--Lease Provision

Legal Opinion: GHM-0070

Index: 3.300, 3.320, 3.325
Subject: Drug-Free Housing--Lease Provision

February 8, 1993

MEMORANDUM FOR: Kathleen Ragan, Chief, Loan Management
Branch, 9HML

FROM: David Cooper, Assistant General Counsel, Multifamily
Mortgage Division, GHM

Michael Reardon, Assistant General Counsel, Assisted
Housing, GCH

SUBJECT: Review of Proposed Lease Addendum

This responds to your memorandum of March 4, 1992, in which you requested that our offices, in accordance with Notice H 91-35, review a lease addendum ("Lease Addendum") proposed for use by The John Stewart Company. (Attachment A.) According to your memorandum, The John Stewart Company manages HUD-insured projects, some of which have Section 8 assistance.

To begin, we assume that the Lease Addendum is proposed for use in projects where use of the HUD Model Lease for Subsidized Programs ("Model Lease"), set forth in Appendix 19a of HUD Handbook 4350.3 Occupancy Requirements of Subsidized Multifamily Housing Programs, is required. (Attachment B.) This is because Notice 91-35 relates specifically to said Model Lease by, among other things, setting forth permissible language that may be added to the Model Lease to clarify that illegal drug activity constitutes a violation of the Model Lease and is grounds for eviction. (Attachment C.) Further, Notice 91-35 establishes that any deviation from the furnished format requires written approval from the Assistant General Counsel, Multifamily Mortgage Division, for projects involving FHA insured loans, and the Assistant General Counsel, Assisted Housing, for projects receiving section 8. As discussed more fully below, we are unable to grant approval of the Lease Addendum.

Notice H 91-35 expired on May 31, 1992, and was not renewed by the Assistant Secretary for Housing-Federal Housing Commissioner. Notice H 91-35 was not renewed because chapter 4 to Handbook 4350.3, was revised to set forth, among other things, the Department's policy with respect to inclusion of language relating to illegal drug activity in the Model Lease. The revision to chapter 4 of Handbook 4350.3. was effective June 30, 1992. A copy of revised chapter 4 to Handbook 4350.3 is included with this memorandum for your reference. (Attachment D.)

In accordance with revised chapter 4 of Handbook 4350.3, there no longer is a mechanism whereby the Assistant General Counsel, Multifamily Mortgage Division, and the Assistant General Counsel, Assisted Housing, will approve individual deviations from the Department's approved lease provisions regarding illegal drug activity. Rather, revised chapter 4 sets forth precise language regarding illegal drug activity which must be used in the Model Lease without variation. (See page 4-5 and revised page 13 of 15 of Appendix 19a of revised chapter 4 to Handbook 4350.3.) More specifically, the Department's present policy mandates that section 23(b) of the Model Lease contain the following language:

"Any termination of this Agreement by the Landlord must be carried out in accordance with HUD regulations, State and local law, and the terms of this Agreement. The Landlord may terminate this Agreement only for:

... criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a tenant, any member of the tenant's household, or any guest or other person under the tenant's control; ..." (emphasis added.)

The above-noted lease provision is mandatory, and HUD Field Offices and State Agencies may not approve changes to it. (See paragraph 4-2(d)(3) and Exhibit 4-3, pages 4-3 and 4-21, respectively, of revised chapter 4 to Handbook 4350.3.) Accordingly, owners of HUD-assisted projects must revise their lease agreements to implement the requirements of revised chapter 4, including the above-noted provision regarding drugs, as the term of each lease comes due for renewal, or not more than 12 months after June 30, 1992, the effective date of revised chapter 4. (See paragraph 3 of the Transmittal Letter, dated June 30, 1992, accompanying revised chapter 4 to Handbook 4350.3.)

In conclusion, we cannot approve the Lease Addendum because the Department has determined that rather than approving individual lease provisions relating to illegal drug activity, the provision set forth in revised chapter 4 to Handbook 4350.3 must be followed. Where The John Stewart Company is utilizing the Model Lease, it must use the language set forth in revised chapter 4.

Please call Frances MacFarlane (202-708-4107), with any questions regarding projects with FHA insured loans, and Vicki Johnson (202-708-0470), with any projects receiving Section 8.

Attachments

