

Drug-Free Housing--Lease Provision

Legal Opinion: GHM-0071

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

February 8, 1993

MEMORANDUM FOR: Richard Warren, Chief, Loan Management
Branch, 3.4HML

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

SUBJECT: Lease Provision for Drug-Free Housing

I am writing in connection with the attached letter from William A. Simkins, Jr., of Progressive Property Management Inc., seeking the Department's approval of a Lease Addendum for Drug-Free Housing ("Lease Addendum"). (Attachment A.) After we received the letter, Frances MacFarlane, of my staff, attempted to contact Mr. Simkins in order to ascertain whether or not the Lease Addendum was proposed for use in projects where use of the 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. When she could not reach Mr. Simkins she called Ms. Jean Mitrovich, of your office, because Mr. Simkins' letter indicated that Ms. Mitrovich had received a copy of it.

Ms. Mitrovich explained that Mr. Simkins' company is no longer in business, and that its projects have been taken over by other management companies. She also indicated that this office should still determine whether the Lease Addendum may be used in the leases of such projects because they remain fully insured and actively managed. She suggested that we direct our response on this issue to your attention.

To begin, Ms. Mitrovich confirmed that the Lease Addendum is proposed for use in projects where use of the Model Lease is required. The issue, then, is whether or not the leases for the projects may be amended to include the Lease Addendum. As discussed more fully below, the project leases may not be amended to include the Lease Addendum.

In this regard, Notice 91-35, Drug Problems in HUD-Insured and Assisted Housing-Lease Changes ("Notice 91-35"), among other things, provided language that could 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 B.) Further, Notice 91-35 established that any deviation from the

furnished format required written approval from the

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Assistant General Counsel, Multifamily Mortgage Division, for projects involving FHA insured loans, and the Assistant General Counsel, Assisted Housing, for projects receiving section 8.

However, 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 C.)

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 to address this issue, which language 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 for revised chapter 4 to Handbook 4350.3, CHG-22.)

Therefore, 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 projects at issue are utilizing the Model Lease, they must use the language for illegal drug activity set forth in revised chapter 4.

Finally, Ms. Mitrovich asked whether projects which had previously amended their leases with language that was acceptable to the Department regarding illegal drug activity, will have to again amend such leases to follow revised chapter 4. The policy of the Office of Housing is that the language for illegal drug activity that appears in revised chapter 4 is to be included in all leases that follow the Model Lease format. Thus, even projects which have incorporated lease provisions regarding illegal drug activity that were previously acceptable to the Department must, as described above, revise their leases to conform to the language presently set forth in revised chapter 4 on this issue.

Please contact Frances MacFarlane, of my staff, at (202) 708-4107 with any questions you may have on this matter.

Attachments