

1.3.2 Section 221(d)(3) Below-Market-Interest-Rate Program

Section 221(d)(3) BMIR housing was originally newly constructed or substantially rehabilitated housing, developed by nonprofit or cooperative sponsors, by private limited-dividend developers or by public agencies.² The developments were financed with FHA-insured mortgages which are held by the Government National Mortgage Association (GNMA) and which bear interest at the rate of 3 percent. The objective of that below-market-interest rate was to provide lower rents for tenants, but the interest subsidy itself amounts to only about \$20 per unit per month. Nonetheless, because many of the projects were built many years ago and their rents were controlled by HUD on a budget basis ever since, their rents were usually lower than private market rents.

Eligible tenants had family incomes beneath maximum limits set by statute at 95 percent of AMI.³ The rents were *not* based upon a percentage of the tenants' income. Instead, the landlord charged a flat rent, which must be approved by HUD, and which equaled the amount necessary to amortize the BMIR mortgage and pay the operating expenses plus a limited profit, if applicable. Most residents paid the BMIR rent; however, if, after moving in, a tenant's income increased and exceeded 110 percent of the BMIR income limit, the household paid 110 percent of the BMIR rent.⁴

The Section 221(d)(3) BMIR subsidy alone was incapable of reducing tenants' rents to levels charged in public housing or Section 8 because the program provides no operating subsidies to offset operating costs. However, owners often secured Section 8 Loan Management Set-Aside or Additional Assistance contracts from HUD to provide the additional subsidies needed to reduce tenants' rents to 30 percent of the tenants' incomes.⁵

When a project defaulted on its mortgage payments, as many Section 221(d)(3) BMIR projects did, GNMA had the right to assign the mortgage to HUD under the mortgage insurance contract. After assignment, if no plan was worked out to cure the default, HUD then had a right to foreclose upon the mortgage and sell the property in satisfaction of the debt, with or without subsidies and restrictions. In some cases, HUD would then acquire title to the project at the foreclosure sale before re-selling it with or without subsidies and restrictions to enable continued low-income use. [See generally](#) §§ 12.3.2 and 12.3.3, *infra*.

Projects that avoided default remained available for low-income families at least for a 20-year period and for the full mortgage term (usually an additional 20 years) if they receive other HUD subsidies.⁶ When many projects began to reach that 20-year mark in the 1980s, Congress enacted programs to preserve these projects as part of the subsidized housing supply.⁷ Many such projects were preserved under these preservation programs, some with long-term use agreements. But by 1997, Congress and HUD stopped funding these preservation programs for new projects, instead authorizing most owners to

¹ Note this section from the last edition of NHLP's "green book" was updated for the 5th edition but excerpted along with other legacy programs.

² 12 U.S.C.A. § 1715/(d)(3) (West 2018); former 24 C.F.R. § 221.510 (1994) (defined different classes of mortgagors, such as nonprofit, public, limited distribution, cooperative, and general), replaced by 24 C.F.R. § 200.5 (2018) (allowing any entity to be mortgagor without distinction).

³ 12 U.S.C.A. § 1715/(d)(3)(ii) (West 2018); HUD, HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, REV-1, CHG-4, ¶ 3-6 (Nov. 2013) [hereinafter "HUD Handbook 4350.3"].

⁴ HUD Handbook 4350.3, [supra](#) note 3, ¶ 5-29 A(2).

⁵ 24 C.F.R. pt. 886, subpt. A (2018); [see also](#) § 12.5.5, *infra*.

⁶ 24 C.F.R. § 200.87 (2018); [see also](#) 12 U.S.C.A. § 1715z-1a(d)(1) (West 2018) (extending use restriction for troubled projects receiving additional HUD assistance).

⁷ Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C.A. § 4101 (West 2018); Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C.A. § 1715/ (West 2018).

prepay their mortgages without restrictions.⁸ For more information on such prepayment problems, see § 12.3.1, *infra*.

Some owners did not prepay their loans and remained in the program until maturity of the mortgage. Maturity terminates the regulatory and use restrictions, threatening displacement and loss of affordable units that are currently unassisted.⁹ Thus, the only Section 221(d)(3) BMIR units remaining are those whose mortgages have not matured, or those that executed project-based Section 8 contracts or continued use agreements under a preservation program.

Under the statute, HUD was responsible for regulating the landlord's rents, charges, and methods of operation.¹⁰ HUD published some regulations for this program in the Code of Federal Regulations and also regulated the landlords through a regulatory agreement executed upon development.¹¹ In addition, HUD published a number of handbooks which have provisions relating to the Section 221(d)(3) BMIR program.¹² The major source of the tenants' rights were the HUD-prescribed regulations,¹³ regulatory agreement and handbooks, the statutes,¹⁴ along with the case law, possibly constitutional doctrines and state law on private landlord-tenant relations.

Comment [N1]: Almost all have matured or exited

⁸Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (Mar. 28, 1996); Pub. L. No. 105-65, 111 Stat. 1343 (Oct. 27, 1997).

⁹See § 12.3.1.4, *infra*.

¹⁰12 U.S.C.A. § 1715(d)(3) (West 2018).

¹¹24 C.F.R. §§ 220, subpt. A, 221, 245, 246, 247, 248 and 290 (2018); FHA Forms 1730 and 1733, Regulatory Agreements for § 221(d)(3) Limited Distribution, Nonprofit and Public Sponsors, formerly reprinted in HUD, MANAGEMENT OF HUD-INSURED MULTIFAMILY PROJECTS HANDBOOK 4351.1 (July 1971), at 213-223.

¹²See Handbooks cited under the § 221(d)(3) program in Appendix 1A to this chapter, *infra*.

¹³In 1996, HUD "streamlined" its regulations, notably by moving the common elements of many housing programs, such as the definition of family income, reporting requirements, restrictions on assistance to non-citizens, and occupancy requirements. See, e.g. 61 Fed. Reg. 5,202 (Feb. 9, 1996), 61 Fed. Reg. 54,498 (Oct. 18, 1996). HUD also removed elements thought to be redundant, sometimes removing important program features. Thus, some program elements are no longer published in the bound volumes of the Code of Federal Regulations after 1995. However, through a savings clause for each program, most former regulations are still applicable to housing built under the prior regulations. See, e.g., 24 C.F.R. § 221.1 (2018).

¹⁴In addition to 12 U.S.C.A. § 1715(d)(3) (West 2018), there are also tenants' rights provisions in 12 U.S.C.A. § 1715z-1b (West 2018).