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**MEMORANDUM**

**TO: NAHB**  
**Attention: DAVID LEDFORD**  
**Staff Vice President**  
**Housing Finance & Housing Policy**

**FROM: COAN & LYONS**

**RE: FHA INSURANCE AND AGE-RESTRICTED PROPERTIES**

**DATE: July 29, 2005**

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We have been asked by NAHB to prepare an opinion regarding whether mortgagors may impose an age restriction on the occupants of housing covered by a mortgage insured under Section 221(d)(4) of the National Housing Act; specifically, whether the owner of a 221(d)(4) project that is intended for the elderly may restrict occupancy to those who are either 62 and over or, in some cases, 55 and over, and, thereby, exclude children as long as the project meets the familial status discrimination exemptions contained in the Fair Housing Act.

**ISSUE**

Section 221(d)(4) of the National Housing Act (the "Act") authorizes the Federal Housing Administration ("FHA") to insure mortgages on rental housing intended for low and moderate income families and displaced families. Beginning a little more than a year and a half ago, FHA began to deny mortgage insurance under the 221(d)(4) program if the applicant indicates an intention to restrict occupancy to those 62 and over ("the elderly") or, in some cases, 55 and over, and, as a result, deny the admission of children.<sup>1</sup>

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<sup>1</sup> Actually, HUD has not denied mortgage insurance to *all* such projects. Apparently, in the absence of a specific direction from the central office, different field offices are doing different things. Some offices are denying applications for insurance while other offices are approving such applications.

FHA has asserted in meetings with NAHB that its “long-standing policy”<sup>2</sup> has been that no project with a mortgage insured under any FHA program may prohibit children, even, with one exception, in those projects specifically intended for occupancy by the elderly<sup>3</sup>.

However, notwithstanding HUD’s assertion to the contrary, this does appear to be a change in HUD’s policy. Over the years, many projects which do restrict their occupancy by age, and, thereby, exclude children, have been developed with insurance under the 221(d)(4) program. Accordingly, the issue is whether under Section 221(d)(4) a project may be designated specifically for the elderly and, if so, whether in so doing, such a project may exclude children.

## **SUMMARY OF CONCLUSION**

Our research reveals that there is nothing in the Act that unequivocally establishes that the 221(d)(4) program was not intended to serve the elderly. In addition, HUD’s own actions over the years clearly support the conclusion that housing for the elderly is within the scope of 221(d)(4), and for the reasons set forth below, such housing may legitimately and legally exclude families with children.

## **EVOLUTION OF SECTION 221**

The National Housing Act was enacted in 1934 to help relieve unemployment, to stimulate the release of private credit for home repairs and construction and to create the FHA. In 1938, the 207 rental housing mortgage insurance program, generally as it exists today, was established. In 1950, a provision was added to Section 207 of the Act requiring a certification from the mortgagor that there would be no discrimination against families with children in the selection of tenants.<sup>4</sup> Section 221, which was added in 1954, was established for the purpose of providing mortgage insurance for low-cost housing for families displaced by governmental action, including urban renewal. Initially, a rental project mortgagor had to be a nonprofit organization. Notably, though, no provision comparable to the provision added in 1950 to Section 207 with regard to children was included in Section 221.

Initially, Section 221 had limited availability. A community had to request it and families displaced by governmental action were given (and still are given) a preference to purchase or rent housing developed under the program. In fact, the number of 221 units developed could not exceed the number of units certified by the Administrator of the Housing and Home Finance Administration, HUD’s predecessor agency, as being

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<sup>2</sup> This so-called policy appears not to be a written policy. At least, no one from HUD has produced any such written policy and, so far, none has been discovered.

<sup>3</sup> The one exception to this is the 231 program. According to HUD, this is the only program intended for the elderly and has encouraged any mortgagor that wants to limit its occupancy to the elderly to utilize that program.

<sup>4</sup> In 1956, an exception to the certification requirement was added with respect to elderly housing, but, in 1959, that exception was removed when the 202 and 231 programs were established.

necessary to house those displaced as a result of governmental actions. Section 221(f) required that projects insured under Section 221 must comply with such standards and conditions as the FHA Commissioner may prescribe. In 1959, profit-motivated entities were made eligible mortgagors under 221 and, in 1961, the 221 program was broadened to apply to low and moderate income families generally.<sup>5</sup>

In 1963, the President sent a message to Congress requesting, among other things, that legislation be enacted to make elderly individuals eligible for Section 221 housing. Accordingly, the definition of “family”, as that term was used in Section 221, was amended in 1964 to include any person who is 62 and over, or who is handicapped.<sup>6</sup>

Currently, the program is intended to assist private industry in providing housing for low and moderate income families and displaced families. Projects developed with a mortgage insured under 221(d)(4) that are designed primarily for occupancy by displaced, elderly, or handicapped families may include central dining and other shared facilities, although, through regulation, HUD has imposed limitations on non-shelter space and non-shelter services that may be provided.

## **HUD REGULATIONS**

Notwithstanding HUD’s assertion that its long-standing policy has been that children may not be excluded from housing developed with mortgage insurance under *any* FHA program, HUD in 1986 issued a final rule intended to clarify that the prohibition against discrimination against families with children did not apply to projects specifically designed for the elderly or handicapped. Specifically, language was added to 24 CFR Parts 207.32a(h)(1) and 221.536(a) to make clear that the mortgagor must make a certification of nondiscrimination against families with children “*unless* the project was specifically designed for housing the elderly or handicapped.” According to the notice in the Federal Register, because the rule was “merely a technical clarification of existing policy”, it was not necessary to seek comments before making the rule final.

These provisions remained in place until 1996, at which time the regulations were reorganized in an effort to streamline them by eliminating obsolete and unnecessary provisions and consolidating provisions repeated for multiple programs. Those provisions determined to be obsolete were removed; those provisions determined to be more in the nature of guidance or explanation would more appropriately be set out in handbooks or other such materials.

As a result of this attempt at streamlining the regulations, the provisions added in 1986 disappeared without explanation. There is no indication that they were specifically or intentionally removed. Rather, Subpart C of Part 221, where the provision pertaining to 221 housing had been contained, was replaced with a cross reference to a new Subpart A in Part 200. This new Subpart A basically sets out general eligibility requirements

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<sup>5</sup> Also in 1961, the below market interest rate program, under 221(d)(3), was created.

<sup>6</sup> In 1970, any person who was a displaced person became eligible as a family under Section 221.

applicable to all FHA programs. Unfortunately, there is no provision comparable to 24 CFR 221.536(a) in the new Subpart A.

## **HANDBOOK AND OTHER MATERIALS**

Consistent with the change made in the Housing Act of 1964, expanding the definition of family in Section 221 to include elderly and handicapped persons, and the change in 1970 to include displaced persons, Handbook 4560.2, the handbook applicable to the 221(d)(4) program, stated that “[e]lderly (62 years of age or older), physically handicapped and displaced single individuals were considered families under [the] program.”<sup>7</sup> Under the section entitled “Occupancy Requirements”, in ¶ 1-10(a)(1), one of the requirements of occupancy set forth is that in selecting tenants, the mortgagor could not discriminate against a family by virtue of the fact that, among other things, there were children in the family. Similarly, in the copy of the Regulatory Agreement contained in an appendix to the Handbook, Form 2466, and which was in use at the time, ¶ 5(a) prohibits owners from discriminating on the basis of children being present in the family. There is no exception made for housing intended for the elderly.

In 1994, the 221(d)(4) handbook was combined with the handbook for the 221(d)(3) program, Handbook 4560.01, into one handbook, Handbook 4560.01 Rev-1.<sup>8</sup> In ¶ 1-1C., which is contained in the section setting forth the purpose of the 221(d) multifamily program, there is a statement that makes clear that projects may be designed specifically for the elderly or handicapped. Under ¶ 2-2, which describes the projects which are ineligible for mortgage insurance under the 221(d) programs, there is a prohibition against restricting the occupancy of a project to any particular group such as students or members of the sponsoring organization except as permitted by law for elderly or handicapped tenants, although there is no indication as to the particular law which may be meant.

Even before the 221(d)(3) and 221(d)(4) handbooks were combined and the changes mentioned above were made, the Regulatory Agreement was amended. Specifically, in the mid-1980s, paragraph 5(a) was amended to permit an exception, when selecting tenants for projects designed primarily for occupancy by elderly persons, to the proscription against discriminating against any person or persons because there are children in the family. It is understood, however, that HUD had accepted changes to that provision in individual situations prior to the formal amendment.

Finally, HUD in 2000 issued (and revised in 2002) the Multifamily Accelerated Processing, or MAP, Guide, which is intended to provide a set of national standards to approved lenders to prepare, process, and submit applications for mortgage insurance, as well as to provide an expedited process for the commitment and issuance of mortgage

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<sup>7</sup> This is set forth in the December 1972 version of the handbook, the earliest version we were able to review.

<sup>8</sup> This continues to be the handbook applicable to the 221(d)(3) and (d)(4) programs.

insurance under the various FHA programs which are covered under the Guide, including 221(d)(4).

Chapter 3 of the MAP Guide contains basic program requirements for the FHA multifamily programs covered by the Guide. Section 3.2 sets forth general requirements applicable to all mortgage insurance programs. With respect to occupancy, ¶ L requires mortgagors to certify that they will not discriminate against families with children except where a project is designed primarily for occupancy by the elderly (age 62 and over).

Section 3.5, which applies specifically to the 221(d)(4) program, states explicitly that projects specifically designed for the elderly are permitted as long they “do not contain the mandatory meals and services, central kitchens and dining areas, and non-shelter spaces associated with retirement service centers.”

## **DISCUSSION**

Recently, as previously noted, HUD has asserted that, by denying insurance in those situations where the mortgagor intends to place an age restriction on the project, it is only enforcing its long-standing policy of not allowing the exclusion of children in multifamily housing under *any* FHA insurance program.

NAHB has asserted, on the other hand, that HUD for many years has permitted mortgagors who have obtained mortgage insurance under the 221(d)(4) program to place an age restriction on their properties if they so chose. In addition, NAHB has asserted that the Fair Housing Act, as it was amended in 1988 and again in 1995, permits owners of housing developed with mortgage insurance under 221(d)(4) to exclude families with children as long as the housing meets the familial status exemption requirements under the Fair Housing Act.<sup>9</sup>

In response to this latter assertion, HUD has responded that the only exemption under the Fair Housing Act for which housing developed under the 221(d)(4) program could qualify and, thereby, be permitted to legally exclude families with children from admission, is the one which permits the Secretary to determine that housing provided under a state or federal program is specifically designed and operated to assist the elderly. According to HUD, the 221(d)(4) program is not such a program.<sup>10</sup>

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<sup>9</sup> The Fair Housing Act was amended in 1988 by the Fair Housing Amendments Act to add familial status and handicap as protected classes. Not infrequently, when referring to the protection afforded families with children and handicapped persons, people refer to the ‘Fair Housing Amendments Act’. However, the correct reference is to the Fair Housing Act.

<sup>10</sup> To date, the only program the Secretary has determined was specifically designed for the elderly and, therefore, exempt under this first exemption in the Fair Housing Act, is the Department of Agriculture’s 515 program for the elderly. The Secretary has never determined any of HUD’s programs to be exempt even though in the legislative history to the Fair Housing Amendments Act, Congress specifically mentioned the 202 program as the type of program the Secretary might declare exempt.

After thoroughly reviewing the Act, including all the amendments thereto and the pertinent legislative history, it is clear that there is nothing in the Act which unequivocally states that projects developed under Section 221(d)(4) could be limited solely to the elderly. The 221 program was originally intended to provide low-cost housing for families displaced as a result of governmental action, including urban renewal. It was expanded to include low and moderate income families generally in 1961. At that time, and until 1964, the term family was not specifically defined. However, in 1964, Congress amended Section 221 to make it clear that elderly (i.e., those 62 and over), or handicapped, individuals qualified within the definition of family or families as those terms were used in that section.

On the other hand, there is nothing in the Act which unequivocally states that housing developed under the 221(d)(4) program could not be limited to the elderly. Unlike Section 8 of the United States Housing Act of 1937, Section 221 does not contain a definition of “elderly families”. All references are to the “elderly” which are persons 62 years of age and over. Under Section 8, the term used is “elderly families” which is defined as a family whose head, spouse or sole member is 62 and over. HUD has taken the position, one which is arguably legitimate, that this definition of “elderly families” does not exclude non-elderly persons from being members of the household. Accordingly, on that basis, the Section 8 elderly program, for example, has been deemed ineligible to qualify for the familial status exemptions in the Fair Housing Act without the Secretary explicitly declaring it exempt, which, of course, has not occurred.

HUD’s other assertion that, by denying mortgage insurance to mortgagors who indicate an intent to place an age restriction on their properties, it is merely enforcing its long-standing policy to not permit the exclusion of children from any multifamily housing under any FHA insurance program, is belied by its own actions, as well as its regulations, written stated policies, handbook and regulatory agreement provisions, and its MAP Guide. For many years, the 207 program was the premiere rental housing program under the Act and, for many years, HUD administered many of the other FHA multifamily programs, including the 221(d)(4) program, in accordance with the rules that governed the 207 program. A good example of this cross application is that, while Section 207 contains specific language which prohibits the Secretary from insuring a mortgage under that Section unless the mortgagor certifies under oath that it will not discriminate against families with children in the selection of tenants,<sup>11</sup> Section 221 does not contain a comparable provision. Notwithstanding, for many years, the same prohibition against discriminating against families with children was applied to the 221 program.

However, sometime in the 1970s, HUD began to get away from this blanket application to other programs of rules specifically applicable to the 207 program, such as

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<sup>11</sup> The specific language in Section 207 is as follows: “Notwithstanding any other provisions of *this section* (emphasis added), the Secretary may not insure any mortgage under this section...unless the mortgagor certifies under oath that in selecting tenants...he will not discriminate against any family by reason of the fact that there are children in the family...”. The language makes clear that the proscription against discriminating against families with children applies *only* to Section 207.

the 221 program. HUD began to allow in individual situations changes to the provision in the Regulatory Agreement that imposed a general prohibition against discrimination against families with children. Then, in the mid-1980s, HUD amended the Regulatory Agreement to provide a specific exception, for mortgagors of projects designed primarily for occupancy by the elderly, from the prohibition against using tenant selection criteria that would discriminate against any person or persons by reason of the fact that there are children in the family. The Regulatory Agreement, still used today, for projects insured under the 221(d)(4) program contains this exception.

Also in the mid-1980s, HUD amended its regulations for both the 207 and the 221 programs in order to “clarify” its existing policy that exempted projects intended specifically for the elderly from having to certify under oath that they would not employ tenant selection criteria that would discriminate against families with children.<sup>12</sup>

Moreover, the MAP Guide contains a provision that also exempts mortgagors of projects designed primarily for occupancy by the elderly (i.e., those 62 and over) from the required certification regarding nondiscrimination against families with children. The Guide also contains a provision that expressly permits projects specifically designed for the elderly, as long as any such project does not contain mandatory services or certain types of central non-shelter spaces. Even Handbook 4560.01, the handbook applicable to the 221(d)(4) program, contains provisions recognizing a distinction with respect to projects designed for the elderly.

Interestingly, although HUD contends that the 221(d)(4) program is not a program specifically designated as an elderly program by statute and, therefore, cannot qualify for any of the familial status exemptions of the Fair Housing Act unless the Secretary declares it exempt, HUD in 1983 expanded the 221(d)(4) program to create the Retirement Services Center program. This program, which was created administratively and not statutorily, was intended, per Notice H 83-58, to “cove[r] the gap between the totally independent living arrangements of non-congregate housing for the elderly and the health-care-oriented nursing home”.<sup>13</sup> Although there was no explicit statement that families with children were permitted to be excluded from admission from such projects, it seems clear that this was contemplated. In this initial Notice, for instance, HUD stated that “[p]rojects must be designed for elderly occupancy only” and that “[c]urrent statutory authority limit[ed] [its] authority with respect to occupancy in congregate housing to elderly, 62 years of age or older, and handicapped.” In addition, the provisions added to the 221(d)(4) handbook following the creation of this new program made clear Retirement Service Centers (“ReSCs”) were intended for the frail elderly 70 years of age and older.

When the program was terminated in 1991 through a rule published in the Federal Register, HUD reiterated, or reinforced, the idea that the program was intended to provide “market-rate rental congregate housing for the elderly with a significant level of

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<sup>12</sup> Allowing such an exception under the 207 program would seem to have been in direct contravention of the statutory language of Section 207.

<sup>13</sup> See Notice H 83-58, issued December 28, 1983.

services and amenities over and above those found in the typical HUD-insured elderly project.”<sup>14</sup>. The preamble to the final rule states that “[t]he primary market for ReSCs originally was considered to be one- and two-person ‘frail’ elderly households in which the age of the head of household [was] 70 or older, as well as the ‘young’ and ‘middle-aged’ elderly seeking the ‘lifestyle’ of age-segregated housing projects offering a variety of on-site services and amenities.”<sup>15</sup>

The rule also made clear that, in terminating the ReSC program, the statutory authority for construction and rehabilitation of housing for the elderly under sections 221(d)(3), 221(d)(4) and 231 of the National Housing Act remained, which, according to statements made by HUD, were, at the time the program was created, the only two programs pursuant to which elderly housing was insured: the 231 and the 221 (Sections 221(d)(3) and 221(d)(4)) programs. HUD made clear that it would “continue to make mortgage insurance available under these sections of the [National Housing Act] for the development or preservation of housing for the elderly.”

More recently, in 1992, Section 542 of the Housing and Community Development Act created the Housing Finance Agency Risk-Sharing Program. According to the statute, the program was intended to facilitate the creation of affordable multifamily housing through a system of risk-sharing agreements with qualified housing finance agencies. To qualify as affordable housing eligible for insurance under the program, the housing had to be occupied by very low-income families. Although the statute does not expressly refer to housing for the elderly, HUD, through regulations (24 CFR Part 266), has determined that projects designed specifically for elderly families are eligible under the program.

There appears to be somewhat of a conflict in the regulations with respect to what is elderly housing, however. When indicating that an elderly project is an eligible project, the regulation indicates that it is referring to housing for elderly families and “elderly families” is defined as any household where the head, spouse or sole member is 62 years of age and over. However, later, in the section of the regulation which requires a certification regarding nondiscrimination against families with children, an exception is made for projects that constitute “housing for older persons” as defined in Section 807(b)(2) of the Fair Housing Act.

Section 807(b)(2) of the Fair Housing Act allows an exemption to the familial status provisions on three bases, one of which is housing intended, and solely occupied by, persons 62 years of age and over. The other two bases are (1) housing provided under a federal or state program that the Secretary determines is specifically designed and operated to assist elderly persons and (2) housing that is intended and operated for occupancy by persons 55 years of age and older where certain other criteria are met.

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<sup>14</sup> See Final Rule, terminating the program, published in the August 29, 1991, Federal Register. The reason the program was terminated was because HUD determined that it had become too expensive; that it served too small a market; and that HUD was ill-equipped to do the underwriting in such a way as to ensure it succeeded.

<sup>15</sup> See, 50 FR 42798.

Despite the apparent conflict, the intent seems clear. HUD intended to allow the development of elderly housing under the Risk-Sharing program and intended to allow such housing to exclude families with children as long as the housing met the criteria for the familial status exemptions set forth in the Fair Housing Act.

## **CONCLUSION**

- The National Housing Act neither unequivocally establishes that the 221(d)(4) program was specifically designed for the elderly nor that it was not intended to cover projects limited to the elderly.
- The term “elderly” in the 221(d)(4) program refers only to individuals 62 years of age and over, not to households headed by an elderly person which household may also include non-elderly members as in the Section 8 program.
- Section 221 does not contain a provision similar to the provision contained in Section 207 of the Act, which prohibits the Secretary from providing insurance under Section 207 without a certification from the mortgagor that it will not employ tenant selection criteria that will discriminate against families with children.
- Arguably, therefore, given this clear distinction, housing limited to elderly households, where the household consists of only persons at least 62 years of age, is within the scope of the 221(d)(4) program.
- HUD has misstated what its historic policy has been with respect to the 221(d)(4) program.
- From at least 1986 to 1996, the regulations for the 221 program clearly stated that projects specifically designed for the elderly or handicapped were not subject to the prohibitions against discriminating against families with children.
- The Regulatory Agreement, Form 2466, which was specifically amended in the mid-1980s and which continues to be used, as well as the MAP Guide, contain provisions that make clear projects developed under the 221(d)(4) program are exempt from the proscriptions against discriminating against families with children.
- The handbook applicable to 221(d)(4) specifically recognizes that projects may be designed for the elderly.
- HUD has contended that the whole program must be intended for the elderly in order to qualify for the familial status exemptions contained in the Fair Housing Act. However, both in the past and currently, HUD has determined that under a particular

program, individual projects may be specifically designed and operated for the elderly, thereby permitting the exclusion of children.

- The Retirement Service Center program, carved out under 221(d)(4), was intended to serve the elderly in age-segregated housing and it is clear that it was not contemplated that the population intended to be served would include children.
- Under the Housing Finance Agency Risk-Sharing program, HUD has determined that housing intended for the elderly (those 62 and over) is an eligible project and, moreover, that such housing may exclude children from admission as long as it meets the familial status exemption criteria contained in the Fair Housing Act.
- Accordingly, notwithstanding HUD's current stated position, there is sufficient basis to designate certain housing developed under the 221(d)(4) program as housing intended solely for the elderly and, therefore, exempt from the prohibitions against discrimination against families with children.
- However, since, under the 221 program, elderly has always been defined as 62 and over, it is difficult to apply these arguments in support of designating projects insured under 221(d)(4) where the age restriction is 55 and over. However, there appears to be no bar on HUD declaring housing that meets the criteria for the 55 and older exemption set forth in the Fair Housing Act eligible for insurance under the 221(d)(4) program, as it has done under the Risk-Sharing program.

Based on the foregoing, we conclude there is a solid basis for holding that housing specifically designed for the elderly, those 62 years of age or over, is permitted under 221(d)(4) and that such housing may legitimately and legally exclude families with children.

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