DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60409

FILE: B-170971 DATE: JAN 22 1976

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MATTER OF: New Community Development Revolving Fund

DIGEST: Revolving fund established by Urban Growth and New Community Development Act of 1970 may not be used by Department of Housing and Urban Development (HUD) to make payments to developer, as "program expenditures," to enable him to repair, maintain and operate development project except subsequent to bona fide determination by HUD to acquire subject property, or to make payments to senior mortgagees or other priority lienholders for this purpose since such actions appear wholly beyond scope of Federal assistance contemplated by Act.

This decision to the Secretary, Department of Housing and Urban Development (HUD), is in response to a request from the General Counsel of HUD regarding use of the revolving fund established by section 717 of the Urban Growth and New Community Development Act of 1970 (title VII of the Housing and Urban Development Act of 1970), Pub. L. No. 91-609 (December 31, 1970), 84 Stat. 1770, 1791, 42 U.S.C. § 4518 (1970). The specific question raised by HUD is:

> "Whether, prior to the acquisition of the Security by the Secretary, she may use funds from the revolving fund to:
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> "A. repair, maintain and operate the security and
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> "B. make payment of amounts payable by the developer to senior mortgagees, obligees under contracts for real property, optionors under real property options, mechanics', tax and other lienors whose liens may have priority over the Government's lien."

For reasons discussed below, we do not believe the fund is available for either of these purposes except to the limited extent indicated.

The General Counsel of HUD points out that there may at times be sound reasons for the Government to make repair, maintenance and operation payments to or on behalf of a new community developer prior to acquisition of the property. The following paragraphs are extracted from the General Counsel's letter:

"Under certain circumstances it will be in the Government's best interests to make payments from the new communities revolving fund * * * for the repair, maintenance or operation of the real property which constitutes its security prior to the acquisition of those interests. These payments would be treated as loans by the Secretary to the developer. They would be made by the Secretary either to the developer for a specific purpose or to the person or entity who has provided the requested services.

"If a developer is in serious financial difficulty and has committed sufficiently serious defaults for the Secretary to consider foreclosure, the developer probably lacks the money to keep the security in good repair and, where appropriate, operating. In such a case, the Government may wish to negotiate with the developer for a deed in lieu of foreclosure to all or part of the security. Either such negotiations or the pursuit of foreclosure take enough time for major elements of security to depreciate substantially if uncared for during that period. In other cases, a developer may currently lack the money to keep the security in good repair, but has the prospect of recovering its financial health in a short time and successfully developing the project.

"In such circumstances, there may be no other ready source of money to protect and preserve the security other than the Secretary's revolving fund. Where the Secretary can reasonably expect to recover the money or minimize her loss as well as serve major statutory purposes by preserving the security in this manner (i.e., the new community is completed where it otherwise might fail), the best interests of the United States are served by making such an expenditure from the revolving fund.

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"An inability to make such expenditures would prevent the Secretary from resorting to basic common law remedies, such as appointment of a receiver, which are available to mortgagees generally. When a mortgagee requests appointment of a receiver to preserve his security or to attempt to counteract a deficiency in the value of the security through collection of rents and profits pending foreclosure, the mortgagee must pay the costs of the receivership. Our only source of funding is the revolving fund (into which

proceeds from foreclosure sales are to be deposited. We believe that the Government should not be deprived of such remedies which are particularly important where, as here, very complex mortgages and large scale projects are involved."

Similar arguments are advanced in support of payments to senior mortgagees and other priority lienholders.

Title VII of Pub. L. No. 91-609, 42 U.S.C. §§ 4501-4532 (1970 and Supp. III, 1973)* provides generally a new and expanded program of Federal assistance for new community development. Financial assistance may take the following forms: Federal guarantee of the obligations of State development agencies and private developers (section 4514); loans to State development agencies and private developers to assist them in making interest payments on indebtedness incurred in financing approved development programs (section 4515); and grants to State development agencies (sections 4514 and 4516). The mechanism for financing this assistance is the revolving fund established by section 4518, set forth in pertinent part below:

"(a) The Secretary is authorized to establish a revolving fund to provide for (1) the timely payment of any liabilities incurred as the result of guarantees or grants under section 4514 of this title; (2) making loans authorized under this part; (3) payment of obligations issued to the Secretary of the Treasury under subsection (b) of this section; and (4) any other program expenditures, including administrative and nonadministrative expenses. * * *

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"(c) Notwithstanding any other provision of law relating to the acquisition, handling, improvement, or disposal of real and other property by the United States, the Secretary shall have power, for the protection of the interests of the fund authorized under this section, to pay out of such fund all expenses or charges in connection with the acquisition, handling, improvement, or

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* Certain sections of title VII were further amended for purposes not here relevant by Pub. L. No. 93-383 (August 22, 1974).

disposal of any property, real, or personal, acquired by him as a result of recoveries under security, subrogation, or other rights."

It is clear that the payments in question, to the extent urged by HUD, are not authorized under section 4518(c), which is expressly limited to expenses relating to the actual acquisition of property and treatment of acquired property. HUD suggests, however, that the payments may properly be deemed "other program expenditures, including administrative and nonadministrative expenses" for purposes of section 4518(a), supra.

The terms "program expenditures" and "nonadministrative expenses" are defined neither in the 1970 Act nor in its legislative history. The committee reports, for example, merely restate the statutory language and provide no further explanation or illustration. H.R. Rep. No. 91-1556, 48-49 (1970); S. Rep. No. 91-1216, 61 (1970). A review of the legislative history of 42 U.S.C. § 3906 (section 407 of the New Communities Act of 1968, Pub. L. No. 90-448 [August 1, 1968], 82 Stat. 476, 515), the precursor of section 4518, produces a similar lack of guidance.

The overall purpose of the 1970 Act, to be sure, is to encourage new community development. Nevertheless, the financial assistance provisions of the Act are designed, not to underwrite development generally, but to accomplish limited and specific goals. Thus, the guarantee provisions of section 4514, which originated in the 1968 legislation, are intended to enable developers to attract private capital which might otherwise not be available. See S. Rep. No. 1123, 90th Cong., 2d Sess. 48 (1968); S. Rep. No. 91-1216, supra, at 32. Similarly, the loan provisions of section 4515 are expressly limited to assisting developers to make interest payments. In this context, it is difficult to see how the payments in question may be deemed "program expenditures," i.e., expenses of the program established by other sections of the Act. There is nothing in the statute, nor in the legislative history, to indicate that Congress ever contemplated having the Government step into the shoes of the developer and assume responsibility for the operation of a project. The type of payments here in question amount, in our opinion, to much more than mere "nonadministrative program expenditures." Rather, they constitute a major type of financial assistance which appears to be wholly beyond the scope of the statute.

It is worthy of emphasis, as noted above, that the loan provisions in the Act are limited to a single purpose. Also, we note that Congress

has given the Secretary adequate authority to act in the event of a foreclosure (sections 4518(c) and 4527(3)). It seems clear that, if Congress had wanted to give HUD a role in assisting developers to ward off foreclosure, it could easily have so provided in the statute.

Further, we note that HUD desires to make payments either to the developer "or to the person or entity who has provided the requested services," i.e., to contractors and/or subcontractors. We fail to find, in either the Act or its legislative history, sufficient basis to establish HUD's authority to make such payments to contractors or subcontractors.

Finally, HUD suggests that the specific authorities enumerated in section 4518(c) serve to illustrate and fortify the purported broad authority of section 4518(a). We do not believe this was the intent of section 4518(c). Rather, we believe that section 4518(c) merely establishes that the Secretary's enumerated authorities in the event of acquisition of the security are to prevail over possibly conflicting provisions of other laws such as the Federal Property and Administrative Services Act. Indeed, this very enumeration of powers to protect the interests of the Government in the event of acquisition, both in section 4518(c) and in section 4527(3), militates against any inference that Congress intended a similar range of authority prior to acquisition.

It may well be that HUD's arguments are sound from an economic standpoint, and that it would be desirable to amend the Act to give HUD the authority to take the desired actions, with adequate safeguards. Also, the words "program expenditures," standing alone, are capable of HUD's proposed construction, and their intended meaning in section 4518(a) is certainly not free from doubt. Nevertheless, in the absence of some clearer indication from Congress to the contrary, we cannot conclude that, as a general proposition, section 4518 was intended to authorize payments of the type in question. There is, however, one limited situation in which payments to repair, maintain and/or operate the security prior to acquisition would appear to be proper under section 4518. Where HUD, in accordance with its established administrative procedures, has made a bona fide determination to acquire a given security, and also determines that payments to repair, maintain, and/or operate the security prior to actual acquisition are necessary to protect the Government's interest in the security, we would not object to use of the revolving fund for such payments as "expenses in connection with the acquisition" of the security.

R.F. KELLER

Deputy Comptroller General
of the United States