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DECISION

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

[Authorization to Convey Federal Archives Building]

FILE: B-200579 DATE: January 7, 1981

MATTER OF: Donation of Federal Archives Building, New York under 40 U.S.C. § 484(k)(3).

DIGEST:

1. We are unaware of any basis for legally objecting to approval of Archives Preservation Corporation's (a wholly-owned subsidiary of the New York State Urban Development Corporation) application for conveyance of the Federal Archives Building in New York City for historic monument purposes and revenue producing activities pursuant to 40 U.S.C. § 484(k)(3). Even though the application requires the developer who will be restoring and maintaining the property to make payments in lieu of real estate and sales taxes, these are customary costs for UDC sponsored projects and they are not being assessed merely to circumvent the requirement that "all incomes in excess of costs" be used for historic preservation purposes.

DLC05738

2. New York Urban Development Corporation may be reimbursed fee representing costs it has incurred in participating in the development and implementation of plan for restoration and maintenance of Federal Archives Building in New York City pursuant to 40 U.S.C. § 484(k)(3) if the Secretary of the Interior deems the fees to be reasonable (and we have we have no information that they are not) since it is UDC's custom to recover these costs from developers under projects it sponsors and these are valid costs of the project.

DLC05739

3. New York Landmarks Conservancy, a nonprofit corporation which participated at the request of the General Services Administration and New York City in preparation of plan and selection of developer to implement plan for repair and maintenance of Federal Archives Building in New York City following donation to State pursuant to 40 U.S.C. § 484(k)(3), may be paid a fee to reimburse the Conservancy its costs if the Secretary of the Interior finds it reasonable. Reimbursement may properly be considered project cost and not "incomes in excess of costs."

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4. Nothing in 40 U.S.C. § 484(k)(3) serves to limit amount of "incomes in excess of costs" which could be generated by revenue-producing activities. Legislative history indicates that Secretary of the Interior is to use as an important criteria in approving financing plans under the statute whether the plan will generate significant amount of income. It also indicates that strict limitations should not be placed on the amount of income which could be generated by a plan. Thus, the bill was amended to indicate that excess income in whatever amount generated be used primarily for public historic preservation purposes. This furthers the purpose of the law by permitting projects susceptible to generating income to assist in restoring and maintaining projects that are not.

This decision to the Administrator of General Services (Administrator) is in response to questions raised concerning an application from the Archives Preservation Corporation (APC) requesting the conveyance of the Federal Archives Building (Building) in New York City for historic monument purposes, pursuant to § 203(k)(3) of the Federal Property and Administrative Services Act of 1949 (1949 Act), as amended, (40 U.S.C. § 484(k)(3)). He questions whether the various provisions in the application relating to the disposition of payments to be made by the Teitlebaum-Starrett Group, the project's developer (Developer), to the State are in conformity with the requirements of the law.

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Under 40 U.S.C. § 484(k)(3), the Administrator is authorized to convey all of the right, title and interest of the United States in and to any surplus real and related personal property which the Secretary of Interior (Secretary) has determined is suitable and desirable for use as a historic monument for the benefit of the public. Conveyance may be to any State or municipal government. The APC is a wholly-owned subsidiary of the New York Urban Development Corporation (UDC), a corporate governmental agency of the State of New York.

The Administrator may authorize the use of the property conveyed for revenue-producing activities if the Secretary first determines that the revenue-producing activities are compatible with the use of the property for historic monument purposes and approves the grantee's plan for conducting and financing the repair, rehabilitation, restoration and maintenance of the property.

However, the Secretary may not approve a financial plan unless it provides that:

> "* * *incomes in excess of costs of repair, rehabilitation, restoration, and maintenance shall be used by the grantee only for public historic preservation, park, or recreational purposes." 40 U.S.C § 484(k)(3)(A).

Also, the deed of conveyance disposing of the property must provide that the property shall be used and maintained for historic monument purposes in perpetuity, and that, should it cease to be used for these purposes, all or any portion of the property shall, at the option of the Government, revert to the United States.

Although the Secretary has found that the proposed use of the Building is consistent with the requirements for a listing in the National Register of Historic Places, and has approved the APC's application, the Administrator has asked this Office to review the application. He notes that under the application, the Developer is required to make the following payments.

Ground Rent. The Developer would pay the APC an amount equal to $10,000, multiplied by the total number of residential units constructed. Payment would be made:

—15 percent upon delivery of the lease;

—15 percent upon the earlier of the funding of the permanent mortgage or six months after the issuance of a temporary certificate of occupancy for 90 percent of the Building; and,

—70 percent over 10 years at 11 percent interest.

—If the Developer markets the Building as a cooperative, all payments with respect to each residential unit would fall due when the unit is sold.

Gross Rent. The Developer would pay APC an amount equal to 8 percent of all income, rent, fees, payments and other charges paid under all commercial subleases, licenses and occupancy agreements.

Payments in Lieu of Real Estate Taxes. The Developer would make payments to APC in amounts equal to the New York City real estate taxes that would otherwise have been payable if the property were not exempt from taxation by virtue of UDC's ownership. The APC would then deposit these payments in the general revenues of the City.

No payments in lieu of real estate taxes would be required on the building's semi-public space. Semi-public space will be rented by the developer to nonprofit groups, educational institutions and community services at subsidized rates calculated at the break-even point to the Developer-- $4 per square foot per year, compared with the $6 to $8 commercial value of the space.

Payments in Lieu of Sales Taxes. The Developer would pay APC an amount equal to the New York State and New York City sales taxes (each equalling 4 percent) otherwise payable if UDC was not the fee owner, but not less than $600,000. The amount paid would be held in trust in an interest bearing account to be applied towards public space projects within the Manhattan Community District Number 2 (the project's location), as approved by Manhattan Community Board Number 2.

Fee Payments. The Developer would also be required to pay a fee of 1 percent of the overall development costs (estimated at approximately $30,000,000) to UDC to cover its direct overhead costs. The Developer would also be required to pay a fee of 1/3 of 1 percent of the overall development costs to the New York City Landmarks Conservancy (Conservancy) to cover its costs.

The Administrator notes that because of GSA's oversight responsibility, it is vitally concerned with the proposed action. He then states:

> "* * *The absence of criteria for determining 'cost' and 'incomes in excess of costs' with regard to: 1) the in lieu of real estate taxes; 2) the in lieu of sales taxes; and 3) the development fees, has prompted our request for your review and advice. However, the proposal raises larger questions involving the legal propriety of using the income from revenue producing activities for non-historic public purposes and the programming of such income to exceed the amount necessary to maintain the historic character of the property so that the excess can be used to finance public historic recreational programs of a particular city generally."

For the reasons set forth below, we find the payments set forth in the proposed agreement to be unobjectional from a legal standpoint.

Analysis

The term "cost" is not a technical one having at all times the same meaning, but a general or descriptive term which may have varying meanings according to the circumstances in which used. Boston Molasses Co. v. Molasses Distributors Corporation, 175 N.E. 150, 152 (Mass., 1931). Since the terms "costs" and "incomes" as used in 40 U.S.C. §484(k)(3)(A) were left undefined, we must look elsewhere for their meaning.

Prior to 1972, while excess Federal property could be donated for historic monument purposes, administrative interpretations equated historic monuments with museums. Income producing use of these properties was considered out of character with the museum concept, and therefore prohibited. Since the cost of rehabilitation and maintenance of the property as a historic monument could be quite high, preservation of the site as a historic monument was in some cases feasible only if productive use could be made of the property or some portion of it. Consequently, S. 1152, 92d Congress and a companion bill, H.R. 6769, were introduced in the Congress for the principal purpose of allowing recipients of historic monuments to use them for compatible revenue-producing activities. See H.R. Rep. No. 92-1189, accompanying S. 1152, p. 2 (1972). S. 1152 was adopted by the Congress to amend section 203(k)(3) of the 1949 Act to read as it does now.

While the nature of the revenue producing activities permitted is not spelled out in the language of S. 1152 as adopted, reference to the legislative history indicates that shops or other commercial activites were mentioned as possibilities. The only reservation expressed concerning revenue producing activities was that whatever use was made of the property, it must be tasteful and compatible with the use of the property as a historic monument. See H.R. Rep. No. 92-1189, p. 3 (1972); Hearing before a Subcommittee of the House Committee On Government Operations, 92d Congress, 2nd Sess., on S. 1152, pp. 32, 35, 47, 49-50, 57, and 61 (1972); S. Rep. No. 92-377, accompanying S. 1152, p. 2 (1971); Hearings before the Subcommittee on Parks and Recreation of the Senate Committee on Interior Insular Affairs, 92d Congress, 1st Sess., on S. 1152, p. 73 (1971); and statements of Rep. Buchanan and Senator Percy (sponsor of S. 1152) during debate on adoption of S. 1152, 118 Cong. Rec. 24018 (1972) and 117 Cong. Rec. 33580 (1971), respectively.

It is clear that since the term "revenue-producing activities" included shops or other commercial activities conducted on a profit making basis, the income and cost to the proprietors of these activities were not to be considered among the income or costs of the grantee. Furthermore, it is clear that some kind of agreement between the grantee and the proprietors was contemplated whereby use of the property by the proprietor of the commercial activity would be authorized in return for some form of fee or monetary remuneration to the grantee. It was this remuneration, less any costs incurred by the grantee for repair, rehabilitation, restoration and maintenance, which would constitute "income" for purposes of the law.

Under the arrangement proposed in APC's application, the Developer would, in return for the Ground Rent, Gross Rent, and other fees paid to the State, assume the actual responsibility for repairing, restoring, renovating, and maintaining the Building as a historic monument for a period of from 75 to 99 years. In return, the Developer would receive the right to develop the interior of the property in accordance with the approved architectural and use plan, and sublease the property to users. While he would incur the development costs, he also would receive any profits to be made from use of the restored property, and will have, of course, assumed the risk of loss as well.

We find nothing in the law that prohibits this kind of arrangement. The UDC has indicated that it chose to use the Developer to restore and maintain the Building since it does not normally handle this aspect of a project it sponsors. Under these circumstances, the use of the Developer seems practical and reasonable. Unless it can be shown that the payments in lieu of taxes and fees being assessed on the Developer somehow circumvent the requirements of 40 U.S.C. § 484(k)(3)(A), we are unaware any basis for legally objecting to the Secretary's approval of the application requiring their payment.

Payment in Lieu of Real Estate Taxes

UDC has indicated that although it is exempt by law from the payment of real estate taxes, it is its well-established policy to make payments in lieu of real estate taxes on all of its projects so local municipalities will not be deprived of needed tax funds which would otherwise have been payable. This policy was initiated as part of UDC'S effort to fulfill its statutory mandate to cooperate with local municipalities in the planning and development of projects. Also, UDC does not wish to alienate municipalities by exacerbating their financial problems.

In keeping with its policy, UDC has entered into a Memorandum of Understanding with the City of New York, dated July 13, 1977. Under the memorandum, UDC has agreed to pay to the City an amount approximately equal to the taxes which would have been payable under the established New York incentive programs for similar properties, had they been privately owned. Furthermore, the payments are also required to be paid to the City under the New York City Board of Estimates Amended Resolution (Cal. No. 81, dated December 6, 1979) as a condition of the Board's approval. We have been informally advised by representatives of UDC that this is a customary requirement of the Board.

Further, we have been provided copies of other agreements containing provisions similar to that set forth in the proposed agreement in which payments in lieu of real estate taxes were required of project developers (for example, the Hanover Square Project and the St. George Project), which make it clear that such payments are customarily required of developers as a condition for UDC sponsorship of a project. Thus, there is nothing to indicate that the requirement that the Developer make payment in lieu of real estate taxes was imposed solely to circumvent the requirements of 40 U.S.C. § 484(k)(3)(A). We therefore find that payments in lieu of real estate taxes are a legitimate UDC project cost and the moneys from the Developer paid to defray that cost do not constitute "excess income" for purposes of the law.

Payments in Lieu of Sales Taxes

UDC has explained its requirement that the Developer make these payments as follows:

> "As a state agency, UDC is exempt from the payment of sales taxes, including those payable on materials incorporated into any project owned by UDC. It is UDC's policy, however, that when a private developer is involved in the development of the UDC Project he nevertheless pays to UDC an amount equivalent to the taxes that otherwise would have been payable. UDC does not retain such amounts; rather, they are used to fund a public benefit project pursuant to the UDC Public Spaces Program."

Other existing projects where these payments have also been required include:

—St. George Hotel Arcade Project - payments in lieu of sales tax used to renovate 7th Avenue IRT subway arcade;

--Hotel Commodore Project - payments in lieu of sales tax used to renovate Grand Central Terminal;

--Hanover Square Project - payments in lieu of sales taxes used to improve parks;

--Albee Square Industrial Project - payments in lieu of sales taxes used to improve subway lighting, painting, benches, and trash receptacles.

Although payments by UDC in lieu of sales taxes are not required by statute, they have for some time consistently been made as a matter of policy. Therefore, the payments may be properly considered costs to UDC which may be passed on to the Developer. We find nothing to warrant a conclusion that these payments are being required merely to circumvent the requirements of the law.

UDC Development Fee

UDC has explained its requirement that the developer pay a one percent fee to it as follows:

> "UDC, as a public benefit corporation, relies on the State Legislature to fund general and administrative expenses. To minimize the use of state funds, UDC requires all entities requesting UDC assistance to pay a Development Fee. This Development Fee is considered a capital cost of the project, conceptually equivalent to the fees for other professional services such as legal, architectural and engineering.
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> "At the time that the basic business terms were negotiated with the Developer and presented to the UDC Directors (June 1, 1979), it was UDC's policy to require of developers the payment of both a fee of 1% of the total cost of the project to cover the related general and administrative expenses of UDC, plus reimbursement for all out-of-pocket expenses such as operational permits, plan review and inspection during construction when UDC acts as the building department and reimbursement for all outside legal and consulting expenses. These fees and reimbursables are payable only if the project is eventually implemented and thus, UDC bears a large upfront risk for which it is not compensated unless the project proceeds.

The fee that the Developer has agreed to pay to UDC reflects this policy, and is estimated to be $300,000. However, it should be noted that it is presently UDC's policy to obtain a much larger fee, depending on the nature of the project, with a minimum of 1 & 1/2% to 2%, often structured to capture the upside potential of a project in compensation for UDC's risk. This is true especially in cases where profits accrue to the entrepreneur as a result of UDC participation.

"A great deal of general and administrative expenses are incurred by UDC in executing a project such as the Federal Archives Building, and most expenses must be borne whether or not a project is eventually implemented and UDC receives its Development Fee. For the Federal Archives Building, members of the Economic Development Department have already spent a considerable amount of time in project analysis and in the financial structuring of the project, including negotiation of the business terms with the developer and the retaining of outside consultants to determine the fair market value of the building. UDC's Corporate Finance Department has performed an analysis assessing the credit of the developer. Our Engineering and Construction Department has worked extensively with the developer in creating the plans and specifications for the renovation, including reviewing the propopsals for building code compliance and preparing independent cost estimates of the project. In addition to work on the preparation and revision of the Application for transfer of the property from the General Services Administration, UDC's Legal Department has worked on an agreement-in-principle with the developer spelling out the terms of the proposed transaction.

"As the transaction progresses, the Economic Development and Legal Department will invest much time preparing and negotiating the terms of the lease and many related documents (e.g. the Project Agreement, the Deed, the Three Party Agreement, the Fund Agreement, Construction and Permanent Financing Documents, etc.)

> The Construction Department will conduct a final review of the construction plans including drawings and specifications, revise the cost estimate for the project, and examine the construction contracts and other documents to determine if UDC procedures and all other governmental and contractual requirement[s] have been satisfied. UDC's Affirmative Action Office will work with the Developer to create an acceptable affirmative action plan which promotes the participation of minority business enterprises in the performance of all contracts entered into in connection with the construction and continued maintenance and operation of the project. UDC will work with the community and implement the Public Spaces Program of UDC whereby the sales tax savings realized by the Developer during the construc-[tion] of the project will be used by UDC, together with any available grants, for a project benefiting the community. During construction, the Project manager, Construction Representative and Affirmative Action Officer will monitor the construction activity for conformance to the project agreement and the affirmative action plan; and finally, the Director of Project Administration will establish and implement adequate systems and controls to assure compliance with the terms of all agreements with all parties during the entire term of the lease (75 years), including collecting rents and inspecting the building to ensure that it is being maintained. In addition to these tasks UDC's staff would undertake any actions necessary in connection with any default of the Developer under its lease or other agreements." Letter from Linda Sidhoum, Assistant Vice President for Economic Development, UDC, to Leonard Wasserman, Esq., Office of the Regional Counsel, GSA, dated August 6, 1980.

Additionally, we have been provided a list of 16 projects under which developers have been assessed a fee by UDC as described above.

In view of the foregoing, we see no basis for objecting to the payment of the fee in question since it appears to be a legitimate cost to the UDC which it has passed on to the Developer. While, as a matter of policy and good accounting practice it might be better if reimbursements were based on actual costs rather than a fixed percentage rate, this does not warrant a recommendation that the application be rejected.

We informally requested that UDC provide us its actual costs related to this project. Although UDC was unable to provide this information, we have nothing to indicate that the fee was unreasonable. In this regard, developers on other projects have paid the fee and in fact UDC's cost experience has resulted in an increase to 1 1/2 or 2 percent on more recent projects. In any event, if the Secretary is satisfied that the fee is reasonable, we see no basis for objecting to the approval of the application because of the inclusion of the Development fee.

Conservancy Fee

The APC application requires a payment of 1/3 of 1 percent of total project costs to the New York Landmarks Conservancy to compensate the conservancy for its expenses in assisting in the planning of the project and the selection of a Developer. The New York Landmarks Conservancy is a private nonprofit corporation organized in 1973 to further the preservation and continuing use of architecturally, historically, and culturally significant buildings in New York City. The Conservancy has indicated that it was invited by GSA in 1974 to initiate a plan for the preservation and reuse of the Building. We note that the "Blue Book" compiled by the New York City's Office of Economic Development for submission to the Board of Estimates indicates the following in its analysis of the Building project:

> "In 1976, the Conservancy presented its plan to the City of New York and received the City's support and aid in effecting the transfer. In order to retain a project manager and other consultants to carry out the project, the Conservancy raised funds from sources such as the Exxon Corporation, the Fund for the City of New York, and the National Endowment for the Arts. In March, 1977, in keeping with agreements reached with the City and the local community board, the Conservancy prepared and distributed a Request for Proposal which was sent to firms experienced in the rehabilitation of older buildings. The request called for a proposal generally in keeping with the principles of the Columbia [University] study which had recommended that the building be converted to a mixture of commercial/residential and semi-public uses in a way that would preserve the architecture of the building and reflect the character of the community.

"The City and the Conservancy set several parameters for re-use plans which entailed substantial extra project costs such as enlarging the building's courtyard to increase light and air and providing central air conditioning.

"Nine development proposals were received and evaluated by the Conservancy, with special consideration given to the plan's commercial feasibility, architectural treatment, area impact and mixture of uses.

"Other criteria considered were the development team's ability to implement the plan and the amount of sublease rentals and other considerations proposed.

"Three finalists were chosen and, from them, the Rockrose Development Corporation was selected.

"In late 1978, the Rockrose Development Corporation withdrew from the project because of difficulty in working with the local community board and in negotiating the final lease arrangements with the Conservancy and the City. The Conservancy and the City then invited the two finalists in the earlier selection process, the Teitlebaum Group and Corland Corporation, to submit new proposals for the redevelopment of the Archive Building.

"The Teitlebaum Group was finally selected based on a plan closer to the desires of the Community Board and greater flexibility regarding the business terms."

Thus it is clear that the Conservancy has incurred expenses directly related to the development of the plan and selection of the Developer to implement the plan for the repair, rehabilitation, restoration, and maintenance of the Building. These appear to be legitimate costs to the developer, even though its participation in the project was initiated first by GSA and then by New York City.

None of the payments made to the Conservancy ever flow to State coffers and therefore, normally the payments would not be considered income to the grantee. However, the Administrator assumes that were not the Conservancy reimbursed, there would be higher payments in the form of Ground and Gross Rents payable to UDC and, in turn, there

would have been more funds available for public historic preservation purposes. In our view, whether or not more funds would have been realized for these purposes is merely speculative, in view of the relatively small amount involved. Moreover, the negotiated rentals were based on comparability studies.

In any event, if the Secretary is satisfied that the 1/3 of 1 percent fee for payment to the Conservancy is reasonable and a legitimate cost to the developer, we have no reason to conclude that the payments are artificially inflated for costs incurred only to indirectly reduce the amount of income to the State.

Generation of Income

Finally, we see no reason to object to APC's application simply because it contemplates generation of income far in excess of the amounts needed for restoration of the Building. There is nothing in the legislation imposing a limit on the amount of income in excess of costs which is authorized. Nor does 40 U.S.C. § 484(k)(3) preclude the establishment of revenue-producing activities operated on or in property conveyed under the statute. We note that the legislative history of S. 1152 indicates that congressional concern was expressed on this issue. Thus, in addressing this point the report of the House Committee on Government Operations states:

> "The Secretary of the Interior is required to approve the grantee's accounting and financial procedures, and has the authority to make periodic audits of the records of the grantee that directly relate to the property conveyed. The committee anticipates that the Secretary will regularly and thoroughly exercise this authority to audit, and will regularly oversee management of the property.
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> "In this connection, the committee was troubled by the provision in S. 1152 relating to income which a particular property might produce that is in excess of the costs of repair, rehabilitation, restoration and maintenance. Representatives from the Department of the Interior testified at the subcommittee's hearing that a proper plan of repair, rehabilitation, etc., should not generate a significant amount of excess income. The committee

> agrees and urges the Secretary of the Interior to use this as an important criterion in approving the grantee's plan of financing. H.R. Rep. No. 92-1189, 3 (1972). Emphasis supplied.

However, we also note that the report indicates that the committee took specific action directed at addressing this problem as follows:

> "In this respect, the committee has amended the excess income provision of S. 1152. Originally, S. 1152 provided that any income in excess of that necessary for repair, rehabilitation, restoration and maintenance shall be used by the grantee for public park or recreational purposes. The committee amended this provision to provide that any excess income should be used for public historic preservation, park or recreational purposes. By inserting historic preservation, the committee intends that any excess revenues from these properties should be directed primarily toward the type of activity that generated it--namely, public historic preservation." H.R. Rep. No. 92-1189, 3 (1972).

From the foregoing, it is clear that the Secretary was expected to use as an important criterion in his approval of financing plans the amount of excess income expected to be generated (with the hope that this amount would not be significant). However, it is also clear that rather than impose a a strict limitation on the Secretary on the amount of income that could be generated, the committee chose to indicate its intent that any income be used primarily for public historic preservation projects, after deducting costs to the grantee.

This is in keeping with the purpose of the legislation which recognized the financial burden imposed on State and municipal governments which maintain property for historic monument purposes. Also while some properties might well be susceptible to use for revenue-producing activities, the potential of other properties to generate revenue could be limited. Consequently, the committee sought to have any excess income from successful projects shifted to help restore, other properties. In fact, this is what the APC proposal contemplates as is indicated by the following:

> "The Archive Building income will be used to preserve other historic structures in New York City by making loans and awarding grants in situations where private mechanisms and existing public programs

> and controls are not sufficient by themselves to ensure the long-term preservation of the historic structure. The fund will be spent for activities such as rescuing landmarks from impending destruction, providing analysis necessary to show that adaptive re-use is feasible and making subsidies for re-use of projects unable to attract adequate private financing. The intent is that the fund should intervene to allow significant buildings to survive and be re-used and then should recover at least a portion of its investment. To some extent, the Archive Building income will function as a revolving fund to be re-used in similar ways." "Blue Book", page 7.

Furthermore, whether incomes are considered significant in relation to any specific proposal must be weighed against other factors which of necessity affect the scope of the proposed project. Thus the size of the building to be restored, the compatible uses which can be made of the property which can generate the amounts necessary to undertake the restoration and maintenance, and the need to assure that persons using the property for profit making activities do not receive a windfall at the expense of the public generally (which would occur if such persons were not required to pay their full fair share for benefits bestowed upon them for the use of the property) must be considered when reviewing the propriety of any financing plan proposed.

In the present case, a ten story warehouse which is historically significant primarily because of its exterior architectural appearance is being converted to a number of uses, all of which have been determined to be compatible with its use as a historic monument. However, because of the magnitude of the project, there is the potential for the Developer to earn a significant return on his investment. Thus the payments required of the Developer should be commensurate with the benefits bestowed. In turn the Developer, by passing on his costs plus an allowance for profits to various users under subleases, assures that these users do not receive an unintended windfall. In explaining how the UDC established the amounts it would charge the Developer, we were informed that:

> "* * *These rental payments, together with fees to be paid to UDC and the Conservancy, represent what UDC staff, working in conjunction with Eastdil Realty and C. A. Frank and Company Company, determined to be the fair market value of the building. A purchase

price equivalency representing the market value of the building under the peculiar programatic and preservation constraints on developement was felt to most accurately reflect what the development market perceives as the associated potential risks and rewards, adjusting itself to produce a 'fair' return to the developer. The rental payment schedule corresponds to the anticipated need for funds, recognizing the limited investment potential of any unused funds by the Trust.

"The purchase price equivalency, and thus the fair market value of the property, was determined based on analysis of comparable sales, of the anticipated income and expenses to be generated from the specific areas and uses involved, and of the potential risks to the developer. A comprehensive survey of the Federal Archives Building Comparables was prepared to determine the purchase price commanded by buildings of comparable size and scope convertible to Class A Multiple Dwelling Units and eligible to receive benefits under Section J51-25 of the New York City Administrative Code. The marketability of the Federal Archives Building's location was assessed, the adaptability of its physical structure was analyzed, and the financial effect of the mandated and other constraints which effect the economics of the project, and thus the purchase price, was determined. Included in this analysis was:

--the potential effect on the ability to finance the project and on the cost of financing that the property being subject to a reverter might have.

--the negative impact on the cost of development and on the annual operating costs of landmark and other mandates such as creation of the required atrium and the provision of central air-conditioning over what would otherwise have been required in the absence of such requirements.

--the relative impact of the Developer's position as a lessee versus the value of a fee position, and

--the special tax preference created by the accelerated depreciation allowable for designated landmarks such as the Federal Archive Building." Letter from Barbara Moore, Vice President, Economic Development Department, UDC to Richard Rosen, Office of Development dated November 27, 1979.

Thus, it would appear that UDC has undertaken to assure that the payments of the Ground Rent and Gross Rent are proper under the circumstances. We are not in a position to judge the reasonableness of the amounts being charged the Developer, and therefore defer to the judgment of the agencies which have negotiated this agreement. In any event, the use of income over costs for the purposes specified is squarely within the contemplation of 40 U.S.C. §484(k)(3), even if substantial income is generated.

Since all the competing interests seem to have been adequately considered and protected, we cannot say it is an abuse of the Secretary's discretion to approve the financing plan proposed in the APC's application. Even though significant amounts of income will be generated, it will be expended for public historic preservation projects as called for under the law.

Milton J. Socolar

For the Comptroller General
of the United States