



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-250888

March 1, 1993

The Honorable Jim Leach
Ranking Minority Member
Committee on Banking, Finance
and Urban Affairs
House of Representatives

Dear Mr. Leach:

By letter dated May 6, 1992, Representative Chalmers P. Wylie, former Ranking Minority Member of the Committee, requested that we review certain aspects of the single-family affordable housing program operated by the Resolution Trust Corporation (RTC) pursuant to section 21A(c) of the Federal Home Loan Bank Act (FHLB Act), 12 U.S.C. § 1441a(c) (Supp. III 1991). In addition to raising several programmatic issues, which we will be discussing separately with your staff, Representative Wylie requested our opinion as to whether RTC is holding single-family property in the affordable housing program longer than allowed by section 21A(c)(2)(B) of the FHLB Act. This provision, discussed more fully below, requires RTC to market single-family property exclusively to certain qualifying purchasers for a period of 3 months and one week. It also provides that property left unsold at the end of the exclusive bidding period may be sold outside the program to any purchaser.

The two specific legal issues raised in Representative Wylie's letter and in our subsequent discussions with his staff are:

(1) Whether and under what circumstances RTC may continue to offer qualifying purchasers the exclusive opportunity to bid on single-family property beyond the period prescribed by the statute; and

(2) If RTC receives an offer to purchase a single-family property within the exclusive bidding period and closing does not occur, whether and how long RTC may remarket the property to qualifying purchasers on an exclusive basis.

The RTC issued an internal legal opinion on the first issue in December 1990, and in response to our request addressed

both issues in a letter dated November 6, 1992. (Copies of these documents are enclosed.) With respect to the first issue, RTC's view is that generally it is not authorized to extend the exclusive bidding period for single family properties beyond 97 days.¹ The RTC's conclusion on this point is based largely on the legislative history of the relevant statutory provision, which it reads as signaling Congress's intention not to allow extensions of the exclusive bidding period. At the same time, RTC believes that, if there is a defect in marketing during the 97-day exclusive bidding period, RTC is authorized to relist the property within the program for an additional 97 days.

With regard to the second issue, RTC's position is that if a single-family property sales contract with a qualifying purchaser falls through, RTC is authorized to remarket the property in its affordable housing program, provided that the total number of days the property is offered for sale under the program does not exceed 97 days. The RTC's rationale is that since it removes single-family property from the program once the property becomes subject to a sales contract, in effect suspending the 97-day exclusive bidding period, it may upon failure of a contract remarket the property for the remainder of the 97-day period consistent with the statute.

For the reasons explained below, we believe that RTC's legal position on both issues is supported by the language and legislative history of the relevant statutory provision, section 21A(c)(2)(B) of the FHLB Act.

RTC's affordable housing program was mandated by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. FIRREA added section 21A(c) of the FHLB Act, 12 U.S.C. § 1441a(c), requiring RTC to implement a program to preserve the availability and affordability of residential real property for moderate to very low-income families.² Section 21A(c) of the FHLB Act distinguishes between single-family and

¹RTC equates the statutory 3-month and one week period to 97 days. See RTC's interim final rule on the affordable housing program, at 12 C.F.R. Part 1609 (May 6, 1992).

²Section 21A(c) of the FHLB Act has been amended several times, most recently by the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. No. 102-233, 105 Stat. 1761.

multi-family property based on the property's size and value.³

Section 21A(c) (2) of the FHLB Act, as amended, contains specific rules governing the marketing and sale of qualifying single-family property. Under these rules, RTC is required to list eligible properties with clearinghouses, providing them with information concerning a property's location, condition, and fair market value. The clearinghouses, in turn, are required to disseminate this information to public agencies, non-profit organizations, and qualifying households,⁴ and RTC must provide these qualifying purchasers of single-family property reasonable access to the property for purposes of inspection. See section 21A(c) (2) (A). RTC also is required to "actively market" single-family property to lower-income families including families having veterans as members.⁵ See section 21A(c) (2) (B).

With respect to the sale of single-family property, section 21A(c) (2) (B) provides qualifying households, public agencies, and nonprofit organizations an exclusive period in which to offer to buy the property after it is first made available for sale. If the property remains unsold at the end of this period, RTC may offer it for sale to any purchaser. The statutory language concerning the exclusive bidding period and its expiration reads as follows:

"[For] the 3-month and one week period following the date on which the Corporation makes an eligible single family property available for

³An eligible single-family property is a one-to-four family residence to which RTC has acquired title, and which has an appraised value that does not exceed the applicable dollar amount set forth in the National Housing Act. See section 21A(c) (9) (G) of the FHLB Act. Eligible multi-family property is property consisting of more than 4 dwelling units to which RTC has acquired title, and which is valued below National Housing Act dollar amounts. See section 21A(c) (9) (E) of the FHLB Act.

⁴A qualifying household is a household which certifies that it intends to occupy eligible single family property as a principal residence for at least 12 months, and which has an income that does not exceed 115 percent of the median income for the area. See section 21A(c) (9) (L) of the FHLB Act.

⁵A lower-income family is defined as including any family or individual whose income does not exceed 80 percent of the median income for the area. See section 21A(c) (9) (H) of the FHLB Act.

sale, the Corporation shall offer to sell the property to [the designated qualifying purchasers]. If upon the expiration of such 3-month and one week period, no qualifying household, public agency, or nonprofit organization has made a bona fide offer to purchase the property, the Corporation may offer to sell the property to any purchaser." (Emphasis added.)⁶

Nothing in the above-quoted language or in the remainder of the applicable statute specifically addresses the issue of whether RTC is authorized to extend the exclusive bidding period for single-family properties after it expires. The underscored language states that following expiration of the 97-day period RTC "may" offer the property to any purchaser. Such language might be taken to mean that RTC has the option either to open up bidding on the property to other purchasers or to extend the exclusive marketing period. While use of the word "may" in a statute usually connotes discretion, the context of the statute or legislative history can indicate a different meaning.⁷ In this case the legislative history suggests that Congress intended to limit the exclusive marketing period to 97 days.

As RTC noted in its legal analysis of this question, the legislative history of FIRREA's single-family housing provisions indicates that Congress considered and rejected language that would have explicitly granted RTC discretion to extend the exclusive bidding period. Specifically, the House bill, in which FIRREA's affordable housing provisions originated, would have required RTC to market eligible single-family properties to qualifying purchasers for a 3-month period "or any longer period determined by the Corporation to be reasonable" before offering to sell the property to any purchaser.⁸ In the conference on FIRREA, the quoted language was deleted without explanation. As the RTC asserts, and in the absence of any contrary indication in the conference report, the deletion of the specific authority for RTC to grant extensions of the exclusive bidding period suggests that Congress did not intend to authorize such extensions.

⁶The statute mandates that the required exclusive bidding period be extended to 180 days if funds are appropriated to RTC to cover the costs and losses associated with such an extension.

⁷See 3 Sutherland, Statutes and Statutory Construction § 57.03 (5th ed. 1992).

⁸See H.R. 1278, 101st Cong., 1st Sess. § 501(a) (1989).

It also is significant to compare the language dealing with the exclusive marketing of single-family properties to the language dealing with exclusive marketing under the multi-family program. The original provisions establishing the exclusive periods for multi-family property, like those pertaining to single-family property, state that upon expiration of the periods RTC "may" market and sell property to other purchasers outside the program. See section 21A(c) (3) (F) of the FHLB Act. In 1991, Congress amended the multi-family provisions to add specific authority for RTC to extend the exclusive periods,⁹ explaining in the House report that RTC would thus be "authorized to relist eligible multi-family property" after the applicable periods had ended.¹⁰ The fact that Congress added to the multi-family provisions specific authority for RTC to extend the exclusive periods, notwithstanding the use of the word "may" in those provisions, indicates that Congress did not view the existing language as providing RTC with the authority to make extensions. Therefore, absent a similar amendment to the provisions governing single-family property, it can be inferred that those provisions do not provide RTC with the authority to extend the exclusive bidding period.

Accordingly, with respect to the first issue, we believe that the history of both the single-family and multi-family housing provisions supports RTC's reading of section 21A(c) (2) (B) of the FHLB Act as prohibiting it from simply enlarging the statutory 97-day exclusive bidding period for single-family property. As indicated previously, however, RTC also takes the position that if the initial 97-day bidding period is defective in some regard, it may remarket the property exclusively to qualifying purchasers for a second 97-day period in order to ensure that these purchasers have the exclusive bidding opportunity contemplated by the law.

While RTC has not specified the type of defects that would justify remarketing of single-family property, it notes generally that such defects may result from the failure to carry out statutory or RTC requirements with respect to the marketing of property to the appropriate target groups. For example, RTC points out that under section 21A(c) (2) (B) of the FHLB Act it is required to actively market eligible single-family property to lower-income families including families with members who are veterans; also, RTC refers to

⁹Section 608 of the Resolution Trust Corporation Refinancing, Restructuring and Improvement Act of 1991, Pub. L. No. 102-233, 105 Stat. 1761, 1782, added a new section 21A(c) (3) (G) to the FHLB Act.

¹⁰See H.R. Rep. No. 358, 102d Cong., 1st Sess. 46 (1991).

requirements it imposes on real estate brokers and others involved in the marketing process to ensure that they reach the appropriate target groups.¹¹ In addition, program guidance recently issued by RTC identifies other requirements that must be met to ensure that single-family property is adequately marketed to the appropriate groups.¹²

We agree that remarketing is justified where the initial marketing was subject to material defects which in effect prevented qualifying purchasers from taking advantage of the exclusive bidding period contemplated by Congress. In these circumstances, remarketing is necessary to provide them with the opportunity which Congress sought to guarantee them. To interpret section 21A(c)(2)(B) of the FHLB Act as precluding remarketing following material defects in the process would defeat the very purpose of the section, which was to enhance the purchasing opportunities of lower-income families and other qualifying purchasers by guaranteeing them a right of first refusal on eligible single-family properties.¹³

With regard to the second question, concerning RTC's authority to remarket single-family property subject to a failed sales contract, RTC explains as an initial matter that it removes from the marketing process any property that becomes subject to a sales contract. If the contract then falls through, RTC resumes marketing of the property. RTC's interim final rule offers the following specific guidance on continuation of the marketing process:

"Property offered for resale. If the RTC receives a purchase offer, but fails to close on an eligible single family property, the RTC may accept an alternative contract offer or notify the appropriate clearinghouses so that the property can be re-offered for sale for an appropriate

¹¹For example, RTC's interim final rule at 12 C.F.R. § 1609.5(b) provides that brokers, auctioneers and other marketing specialists must actively market properties on their listing services and advertise them in local media and media targeted to low- and moderate-income families.

¹²The program guidance issued on December 2, 1992, states that for a property to be adequately marketed there must be, among other things, effective implementation of a marketing plan; prequalification and counseling of prospective purchasers; and the provision of accurate and complete information about a property to clearinghouses.

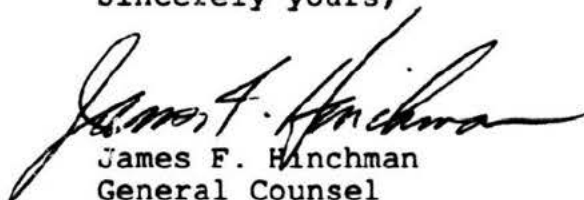
¹³See the conference report on FIRREA, H.R. Rep. No. 209, 101st Cong., 1st Sess. 418-420 (1989).

interval determined by the RTC, provided, however, that the appropriate interval shall not exceed 97 days." 12 C.F.R. § 1609.7(a)(8).

In further explanation of the above-quoted provision, RTC states that when a property is offered for resale, the number of days it may be marketed on an exclusive basis is limited to 97 days less the number of days for which it previously was marketed. Thus, the aggregate number of days for which the property is marketed--before the property's removal from the program and after its reentry--may not exceed 97 days. In our view, this policy is consistent with section 21A(c)(2)(B) of the FHLB Act as analyzed above, since it provides qualifying purchasers with no more and no less than the 97-day exclusive bidding opportunity the statute requires.

In sum, we believe that RTC's position on both issues relating to the exclusive bidding period for single-family property is legally appropriate. By separate letter of today, we are providing a copy of this analysis to Mr. Wylie.

Sincerely yours,



James F. Hinchman
General Counsel

Enclosures

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March 1, 1993

DIGEST

Pursuant to section 21A(c) (2) (B) of the Federal Home Loan Bank Act, 12 U.S.C. § 1441a(c) (2) (B), the Resolution Trust Corporation is not authorized to extend the exclusive bidding period for single-family residential properties in its affordable housing program beyond 97 days, but may remarket property if significant defects occurred in the initial marketing effort. Further, RTC is authorized to remarket single-family properties under the affordable housing program where a sales contract with a qualifying purchaser falls through with 97 days being the total number of days the property is offered for sale under the program.