

DECISION



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

FILE: B-170971
MATTER OF:

DATE: JUL 9 1976

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New Community Development Program

DIGEST:

In view of broad authority given to Secretary of Housing and Urban Development (HUD) in section 726(3) of Urban Growth and New Community Development Act of 1970, Secretary has discretion in selecting course of action to pursue where developer, whose debentures have been guaranteed by HUD, is in serious financial difficulty and HUD has acquired the property. Statute does not restrict Secretary to alternative which would minimize loss to Government. Expenditures authorized under section 726(3) would thus appear to be "program expenditures" for which revolving fund is available.

This decision to the Secretary of Housing and Urban Development is in response to a request dated June 28, 1976, concerning the Secretary's authority to use funds from the revolving fund established by the Urban Growth and New Community Development Act of 1970. The specific question is whether the revolving fund is available--

"to acquire, handle and dispose of all or a portion of the real property comprising a new community project as to which this Department has guaranteed debentures under Title VII of the Housing and Urban Development Act of 1970, 42 U.S.C. 4501, et seq., in cases where the Department anticipates that as a result of expenditures for acquisition, handling and disposition of such property, the Department will incur losses over and above the loss of payment in full on the guaranteed debentures."

The Urban Growth and New Community Development Act of 1970 was enacted as title VII of the Housing and Urban Development Act of 1970, Pub. L. No. 91-609 (December 31, 1970), 84 Stat. 1770. Designed to establish a new and expanded program of Federal assistance for new community development, the Act authorizes several types of financial assistance. Section 713 of the Act, 42 U.S.C. § 4514, authorizes the

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Secretary to guarantee the obligations of private new community developers and State land development agencies, subject to certain limitations, and pledges the full faith and credit of the United States to the payment of such guarantees. The primary financing mechanism under the Act is the revolving fund established by section 717, 42 U.S.C. § 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 disposal of any property, real or personal, acquired by him as a result of recoveries under security, subrogation, or other rights."

The Department of Housing and Urban Development (HUD) summarizes its dilemma as follows:

"All of the 13 New Community developments were carried out pursuant to the basic congressional purpose to establish viable, well-planned, large New Community developments as an alternative to urban sprawl. It is fair to say that when the 1968 and 1970 legislation was enacted, it was not foreseen that the security which would be available to the Government upon paying the debenture holders pursuant to the guarantee would be worthless. However, virtually all of the New Community projects are now in severe financial difficulties, and it now appears that the value of the land owned by each New Community developer is such

that acquisition of the property is not expected in most cases to produce a net positive recovery for the Government, after taking into account the amount of mechanic liens and first mortgages ahead of the Government's lien."

HUD's position regarding its authority under the Act is stated below:

"We believe that a sound policy would be for the Government to deal with each distressed New Community in a manner which on the one hand minimizes damage to local governments, residents of the immediate area and private entities involved in the New Community development, and on the other hand represents an economical approach which limits losses to the Federal Government in a reasonable manner.

"While it appears to be the case that the Federal Government could avoid additional losses over and above payment of the debenture holders by simply walking away from a financially distressed New Community, we believe that the proper role of the Federal Government is to undertake such steps as are necessary to bring about responsible and orderly disposition of each distressed New Community."

HUD supports its position by emphasizing the "public purposes" set forth in section 710 of the Act, 42 U.S.C. § 4511. In determining the appropriate course of action, HUD must, it is urged, look to the fulfillment of the statutory purposes, and must also consider "the impact of the agency's decisions on those who were intended to benefit from the legislation." HUD also points to the broad authority of section 726(3) of the Act, 42 U.S.C. § 4527(3), which provides:

"In the performance of, and with respect to, the functions, powers, and duties vested in him by this part, the Secretary, in addition to any authority otherwise vested in him, shall-

* * * * *

"(3) have the power to foreclose on any property or commence any action to protect or enforce any right

conferred upon him by law, contract, or other agreement, and bid for and purchase at any foreclosure or other sale any property in connection with which he has provided assistance pursuant to this part. In the event of any such acquisition, the Secretary may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, complete, administer, remodel and convert, dispose of, lease, and otherwise deal with such property. * * * (Underscoring supplied.)

We are advised that the issue relates, at least potentially, to several new community projects. We understand, however, that the most urgent situation is that of Gananda, a project approximately 12 miles east of Rochester, New York. HUD has guaranteed obligations with respect to Gananda in the approximate amount of \$22 million. Information available to us indicates that development activity at Gananda ceased in October 1974 after completion among other things, of roadways, a sewage treatment plant, a multi-use neighborhood center, part of which is currently being used as a public elementary school (85% completed), and "infrastructure" (electrical, water, sewer, gas and cable television) for dwelling units. It appears that there are at present no completed dwelling units at Gananda (apart from a few model units) and thus no on-site population base, the school serving residents of neighboring towns.

We are advised that, according to HUD studies, there is virtually no market for Gananda as a "new town," but market potential appears to exist for a smaller residential subdivision development. Faced with the developer's severe financial situation, HUD is in the process of considering various alternatives. One possibility would be simply to pay the guarantees and terminate HUD's involvement with the project. Another possibility under consideration is for HUD to foreclose on its security, obtain clear title by paying claims and liens out of the section 717 revolving fund, and transfer an appropriate portion of the property to a new builder.

In a recent decision, B-170971, January 22, 1976, we had occasion to consider the Secretary's authority under the 1970 Act in a somewhat different context. We concluded in that decision that the revolving fund was not available to HUD to make payments to a developer to enable him to repair, maintain and/or operate a project prior to acquisition by HUD, except subsequent to a bona fide determination by HUD to acquire the property in question. We expressed the view that such payments could not reasonably be deemed

"program expenditures" under section 717(a)(4), but rather constituted a major type of financial assistance to project developers beyond the scope of the statute.

Our view of the 1970 Act, as reflected in our prior decision, is that Congress did not intend to give HUD an unlimited role in supporting new community developers prior to acquisition of projects in financial distress. Similarly, we doubt that Congress envisioned HUD making extensive investments on the order of the present situation with regard to acquired projects. Nevertheless, from a legal standpoint there is one significant difference--the existence of the Secretary's authority in section 726(3), supra, to "complete, administer, remodel and convert, dispose of, lease, and otherwise deal with" property in the event of acquisition by HUD. We have found nothing in the legislative history of Pub. L. No. 91-609 to explain this provision or otherwise define its intended scope.

In the absence of contrary indication in the legislative history, section 726(3) must be viewed as giving the Secretary discretion to select the option she considers best from among those available in the event of project acquisition. Also, as HUD points out, the Secretary must consider the available alternatives in light of the statutory objectives. See, e.g., Colc v. Lynn, 389 F. Supp. 99 (D.D.C. 1975). Accordingly, it is our view that the Secretary is not restricted to that course of action which will result in minimum loss to the Government in each instance and that to the extent a given expenditure is authorized under section 726(3), it constitutes a "program expenditure" for purposes of section 717(a)(4).

We emphasize that this decision is addressed solely to the question of the Secretary's legal authority and we make no comment as to the advisability, from either a policy or an economic standpoint, of any specific course of action regarding any project. The administration of the new community development program will be a subject of continuing interest to this Office.

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States