

the need for low-income housing and the availability of funds, HUD's original regulation required, as a matter of policy, replacement housing as a condition for HUD approval in all cases of either demolition or disposition of dwelling units. However, the Housing and Urban-Rural Recovery Act of 1983 ("1983 Act") repealed former sections 6(f) and 14(f) and substituted a new section 18 that was more detailed and prescriptive. HUD decided to impose a replacement housing requirement only where required by the statute, and both the statute and the rule allowed the PHA discretion as to the provision of replacement housing with one exception. The only circumstance under which the statute and the rule required replacement housing was where the justification for disposition is that it will allow acquisition, development or rehabilitation of other units which will be more efficiently or effectively operated as lower income housing and will preserve the lower income housing stock available in the community. (See section 18(a)(2)(A)(i), U.S. Housing Act of 1937, 42 U.S.C.1437p.) No replacement housing requirement was prescribed under the other two alternative criteria for disposition, and no replacement requirement was prescribed at all for demolition, regardless of which of the demolition criteria was applicable.

The argument for retroactive application of the 1987 amendments is not persuasive. Indeed, in *Project B.A.S.I.C. v. Kemp*, 907 F.2d 1242 (1st Cir., July 6, 1990) the Court of Appeals for the First Circuit rejected the retroactive operation of the statute. The Fifth Circuit was in accord in *Walker v. HUD*, 912 F.2d 819 (5th Cir., September 27, 1990).

To preclude any further misconceptions on this point, the final rule adds clarifying language under § 970.2(b). A demolition or disposition application that received written HUD approval before February 5, 1988, may be carried out according to the terms and conditions of the approval and the regulations in effect at the date of approval, without the necessity for meeting any additional requirements under the 1987 Act or for seeking any additional HUD approval.

Applicability to Units Approved for Deprogramming

Several commenters objected to the inclusion in the interim rule's listing of exceptions in § 970.2(g) of "units deprogrammed before February 5, 1988" (the effective date of the 1987 Act). In a subsequent notice, however, this provision was corrected to read "units

approved for deprogramming before February 5, 1988". (See 53 FR 40220, October 14, 1988).

The final rule removes the "units approved for deprogramming" exception. The term "units approved for deprogramming" refers to HUD approval of a formal written request by a PHA to permanently remove a unit from both its public housing inventory and its ACC. (See 24 CFR 990.102). The exception for "units approved for deprogramming prior to February 5, 1988" was intended to exclude from the coverage of the interim rule, units which HUD had approved for demolition or disposition, prior to the effective date of the 1987 Act amendments. Because the term "units approved for deprogramming" is misinterpreted by some to include units temporarily removed for non-dwelling use, as well as, units approved for demolition or disposition, utilizing this term has caused unnecessary confusion in the administration of HUD's demolition or disposition regulations. Therefore, the exception which references "units approved for deprogramming" is being deleted. A new § 970.2(b) of the final rule more clearly states the intended exception which is that demolitions and dispositions approved by HUD prior to February 5, 1988, are exempt from the requirements of the 1987 Act. Demolitions or dispositions that were approved by HUD before February 5, 1988, but not carried out by that date, may be carried out according to the terms of such approval, without reference to subsequent amendments to this part and without obtaining any further HUD approval. Conversions and reconfigurations of interior space are exempted by § 970.2(a)(5).

Other commenters argued for some degree of flexibility. One urged that the exception from the replacement housing requirement be extended to include units that were uninhabitable as of February 5, 1988, and defined such housing as housing stock that was not suitable and usable for housing purposes and that was not being used by the PHA as part of its housing stock as of February 5, 1988. Another commenter suggested that HUD be authorized to waive the replacement requirement in special situations, such as where there is an urgent need for demolition, but special problems preclude replacement. While arguments for some degree of flexibility have considerable merit the statute does not provide for such flexibility.

Exemption for Homeownership Sales to Residents

Some commenters argued that the 1987 Act amendments make the disposition provisions applicable to homeownership sales to tenants, because the 1987 Act removed the paragraph that specifically excepted such sales. One commenter asserted that Congress intended to make only the replacement housing provisions applicable to homeownership sales.

There is nothing to suggest that Congress intended to make homeownership sales subject to the disposition provisions, including not only the replacement housing provision, but also the justifiability provisions under the statutory criteria, the local government approval provision, and the tenant consultation provision. This means that the issue is not germane to any of the following homeownership units whose sales were approved (even if not completed) before February 5, 1988:

- All existing Turnkey III units, because approval for sale was incident to approval for development. (Development of additional Turnkey III units was suspended before enactment of the 1987 Act, so there is no issue as to post-February 5, 1988 approvals for Turnkey III sales.)
- All Mutual Help units approved for development before February 5, 1988, whether in existence or in the process of development as of that date. (Like Turnkey III, approval of sales of Mutual Help units were incident to approvals for development.)
- All units approved for sale under the Public Housing Homeownership Demonstration, because all such approvals were made before the effective date of the 1987 Act.
- All units approved for sale under the section 5(h) Homeownership Program before the effective date of the 1987 Act. (This refers to the regular Section 5(h) Homeownership Program under which a number of PHAs have chosen to initiate homeownership sales to tenants over the 15 years since this statutory option was added in 1974, as distinguished from the demonstration that was undertaken by HUD under the authority of section 5(h).)

The Department believes that it was not the intent of Congress to make the disposition requirements applicable to homeownership sales via resident management corporations under the new Public Housing Homeownership and Management Opportunities program established by section 123 of the 1987 Act (section 21 of the 1937