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HOUSING MANAGEMENT BUREAU MEMORANDUM #2009-B-05

To: All Housing Companies
Owners, Managing Agents and Site Managers

From: Robert Damico, Downstate Director
Housing Management Bureau

Date: May 1, 2009

Subject: Standards and Procedures for Requests by Mitchell-Lama Housing Companies
For Approval of Refinancings and Redevelopment Plans.

This bulletin sets forth standards and procedures adopted by the New York State Division of Housing and Community Renewal ("DHCR") for processing requests for approval of refinancings and redevelopment plans made by DHCR-supervised housing companies organized under Article II of the Private Housing Finance Law ("PHFL") known as Mitchell-Lama Housing Companies. This bulletin supersedes and replaces Housing Management Bureau Memorandum #2005-B-01.

Refinancings may be funded by private banks or public lenders such as the New York State Housing Finance Agency ("HFA"). Those involving HFA are governed by a Memorandum of Understanding ("MOU") between DHCR and HFA, and are treated somewhat differently, as will be noted herein.

DHCR has found that refinancings with redevelopment plans involving multiple funding sources are an invaluable tool for the revitalization of its Mitchell-Lama portfolio. They allow housing companies to remain in the Mitchell-Lama program and take advantage of new opportunities for increased funding under more favorable terms for much needed capital work, in addition to restructuring existing subsidies, such as Section 236 Interest Reduction Payments ("IRP"), and adding new ones such as Low Income Housing Tax Credits ("LIHTC"). DHCR strongly supports these redevelopment transactions and is committed to working with the housing company, public agency, and/or private lender to facilitate their completion. Toward that end, this bulletin is a guide to DHCR's role in the review process.

A. DHCR's Standards for Review and Approval.

DHCR encourages housing companies to refinance for the following purposes:

1. To reduce debt service in order to meet expenses while avoiding or minimizing increases in rent or maintenance.

2. To raise additional funds for current capital improvements.
3. To bolster reserve funds for future capital improvements.
4. To facilitate a redevelopment plan involving new sources of funding such as tax exempt bond financing or LIHTCs.

Refinancings should not be undertaken for the following purposes:

1. For the sole purpose of raising funds for an expense that may be adequately covered by existing reserves.
2. Where debt service on the new loan would require a burdensome rent or maintenance increase.
3. Where satisfaction of the existing mortgage would terminate the real property tax exemption, trigger a pre-payment penalty for a subordinate loan or grant, or otherwise jeopardize a government loan or grant.

B. How DHCR Can Facilitate Transactions.

In order to facilitate the approval of refinancings, DHCR may modify its supervisory practices to avoid unnecessary duplication with the lender, and to allow the lender a greater role in the monitoring of the housing company's use of loan proceeds and reserve and/or escrow funds.

Additionally, in the case of a comprehensive redevelopment plan involving multiple funding programs that may be administered by different agencies, DHCR will attempt to modify its supervisory practices to avoid unnecessary duplication between programs and/or agencies. PHFL Section 32(8) authorizes DHCR to:

...modify supervision of a housing company upon finding that duplicative supervisory functions may impose an undue regulatory burden or unnecessary expenditure of agency resources, by taking such actions as are deemed appropriate, including consolidating supervisory functions associated with different programs, and entering into memoranda of understanding with other agencies for the allocation of supervisory functions.

For HFA refinancings, DHCR and HFA have entered into an MOU with respect to the general allocation of supervision between the agencies. That MOU requires that upon refinancing, DHCR, HFA and the owner will enter into a Supplemental Agreement setting forth in detail the respective supervisory roles of each agency, in recognition of the fact that each development may participate in its own unique combination of programs.

Where a comprehensive redevelopment plan calls for a mortgage loan to cover acquisition costs, PHFL 22-a authorizes DHCR to approve the loan provided it does not result in a burdensome rent increase and the owner agrees to remain in the Mitchell-Lama program for at least fifteen years from the date of the refinancing.

C. Request for DHCR Approval.

No less than ninety days prior to the anticipated date of closing, the housing company must submit to DHCR a request for approval of the refinancing. This time period may be shortened by DHCR upon a showing of exigent circumstances calling for more expedited treatment.

The request must include the following information set forth under the item numbers below. Where the requested information does not apply to the transaction, applicants should insert “NA” following the item number.

For HFA refinancings, where the requested information is set forth in a document generated in connection with the funding application to HFA, simply reference the document under the appropriate item number and attach a copy thereof.

Note that capital work, rent increases, or change in management must be approved by DHCR’s Office of Housing Operations, so additional time should be allowed for processing, particularly for a rent increase which requires a Budget Review Determination (“BRD”) proceeding. The same is true with respect to applications to DHCR for other sources of funding.

1. Reasons for refinancing. If the housing company is a cooperative, attach a copy of the board resolution authorizing the refinancing.
2. Existing mortgagee, approximate outstanding balance of existing mortgage loan, and brief description of mortgagee’s pre-payment procedures. Mortgagees may include HFA, Empire State Development Corporation (“ESDC”), New York State administered by the Office of State Comptroller (“OSC”), or a private lender.
3. Existing government subsidies, the funding agencies, and a statement as to what effect, if any, the refinancing will have upon the subsidy. This may include, for example, Section 236 IRP, LIHTCs, Rental Assistance Payments (“RAP”), Housing Assistance Payments (“HAP”), Rent Supplement, Property Improvement Program (“PIP”) loan, Tenant Health and Safety grant, and Flexible Subsidy.
4. Impact, if any, of the refinancing on real property tax abatement. Note that satisfaction of a mortgage often terminates a tax abatement, in which case the locality would have to authorize a new one.
5. New lender, amount of new loan, interest rate, application or commitment fee, and method by which new lender was selected. Attach a copy of the term sheet and commitment letter.
6. Credit enhancement. This may be provided by such agencies as Freddie Mac or SONYMA.
7. Post-transaction sources of funding, and supervising agency if other than DHCR. This may include, for example, tax exempt bond financing, decoupled Section 236 IRP, LIHTCs, and Enhanced Vouchers.

8. New owner and description of ownership structure, where transaction involves transfer of a development, ownership interest in the housing company, or beneficial ownership. Attach completed Statement of Qualifications to request DHCR's approval of the new owner. Note that under PHFL Section 16(3) beneficial ownership may be held by either a limited partnership ("LP") or limited liability company ("LLC").

For HFA refinancings a new owner must also satisfy that agency's qualifications for ownership.

9. Capital work and the estimated cost thereof. Attach a copy of current physical condition survey or consultant's report; allow at least sixty days for review by DHCR's Architecture and Engineering Bureau.

This is not required for HFA refinancings because that agency conducts its own review of capital work to be funded by the HFA loan.

10. Amount of reserves to be funded from transaction proceeds.

This is not required for HFA refinancings because that agency is responsible for determining appropriate sources and levels of reserves.

11. Any severance of housing company property, including justification for the severance. Attach a copy of a certified appraisal including a description and value of the parcel to the severed.

12. Analysis of current rent/maintenance structure to show sufficiency to cover new debt service and other expenses, and if not, amount of rent increase applied for and status of application. Allow at least one hundred fifty days for DHCR's Audits and Accounts Bureau to conduct a BRD proceeding.

13. Request and justification for any modification of DHCR's supervisory role such as those set forth in Section "D" below.

This is not required for HFA refinancings because supervision will be governed by a Supplemental Agreement with HFA.

14. New managing agent, if one is being installed. This must be approved by DHCR's Housing Management Bureau. Allow at least thirty days for review.

For HFA refinancings a new owner must also satisfy that agency's qualifications for managing agents.

15. Anticipated date of closing.

D. Requests for Modification of DHCR's Supervisory Role.

For HFA refinancings, supervisory modifications are governed by a Supplemental Agreement between DHCR, HFA, and the owner as required by the MOU between DHCR and HFA. The Supplemental Agreement sets forth in detail the allocation of supervisory duties between the respective agencies.

For non-HFA refinancings, at the lender's request, under appropriate circumstances DHCR may agree to any of the following modifications of its supervisory role, the terms of which may be embodied in a multi-party agreement or an approval letter issued by DHCR.

1. Remedies for Default. DHCR may agree to promptly act within its authority to remedy a default on a loan, including proceedings to re-establish the rents/maintenance. However, DHCR will not agree to act in a predetermined manner, but must retain its discretion to choose the appropriate remedy under the circumstances.
2. Administration of Reserve and Escrow Funds. DHCR may permit the lender to hold certain reserve and escrow accounts which are normally held by DHCR in an Operating Escrow Fund ("OEF") account, to encumber those accounts as security for the loan, and withdraw them without DHCR approval in the event of a default. These funds may include capital repair and replacement reserves, as well as escrow funds for debt service, taxes, and insurance. However, DHCR generally will not permit the housing company itself to hold the reserve or escrow funds.
3. Supervision of Capital Work. DHCR may modify its procedures for supervision of capital work, which normally includes review of contracts, specifications, bids, change orders, and approval of progress payments in order to insure that DHCR's participation is not duplicative of another agency's functions, and does not unduly delay completion of the work.

E. Submission of Loan Documents to DHCR.

No later than thirty days prior to the anticipated date of closing, the housing company must submit the following proposed documents for DHCR's review:

1. Multi-party agreement, if any.
2. Mortgage and note.
3. Security agreements and those involving reserve or escrow accounts.
4. Assignment of leases.
5. New or amended regulatory agreements involving DHCR.
6. Documents governing change in ownership, if applicable.
7. Other documents requiring DHCR's approval or signature.

F. DHCR's Concerns in Reviewing Loan Documents.

DHCR reviews the loan documents to insure that they meet the following criteria:

1. They are not in conflict with any provision of the PHFL or regulations.

2. They are not unfair or overly burdensome to the housing company, such as imposing costs that are unreasonable or which the housing company may be unable to afford, or imposing duties that it is unable to perform.
3. They clearly reflect any agreed-upon modification of DHCR's supervisory practices with respect to the development, and will not affect DHCR's authority to supervise the housing company except to the extent expressly agreed to by DHCR. For non-HFA refinancings, DHCR requires that the following clause be included in the multi-party agreement, mortgage, other security agreements, reserve agreements, and assignment of leases:

“Nothing in this document, or any other document executed in connection with this refinancing transaction, will have the effect of diminishing or otherwise modifying DHCR's authority to supervise the borrower under Article II of the Private Housing Finance Law and regulations promulgated thereunder except to the extent expressly set forth in a multi-party agreement or approval letter issued by DHCR.”

For HFA refinancings, similar language is used in HFA's regulatory agreement with the owner which references the Supplemental Agreement with respect to supervision.

4. They will give sufficient notice to the parties to the transaction, and any third party who examines the loan documents, that the housing company is supervised by DHCR and subject to the Private Housing Finance Law and regulations. To accomplish this, DHCR generally requires that the above language be included in all of the documents (listed above) that deal with functions supervised by DHCR, and that at least one of these documents (usually the mortgage) be recorded.

For HFA refinancings, incorporation of appropriate language in HFA's regulatory agreement with the owner is deemed sufficient notice.



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