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B-188240, Aug 10, 1977

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B-188240, AUG 10, 1977

SINCE MATURITY DATE OF NOTE SUBMITTED FOR INSURANCE PURSUANT TO TITLE I OF NATIONAL HOUSING ACT WAS SUBSEQUENTLY EXTENDED BY THE LENDER'S WRITTEN AGREEMENT BEYOND THE 7-YEAR 32-DAY MAXIMUM STATUTORY TERM FOR SUCH LOSSES THAT WAS IN EFFECT AT THE TIME THE LOAN WAS MADE, LENDER'S CLAIM FOR REIMBURSEMENT OF ITS LOSS ON NOTE MUST BE DENIED. BANK'S CONTENTION THAT IT SHOULD BE ALLOWED TO RESCIND EXTENSION AGREEMENT MUST BE REJECTED SINCE AGREEMENT IS CLEAR AND UNAMBIGUOUS AND NO BASIS IS PRESENTED THAT WOULD OTHERWISE JUSTIFY RECISSION.

BOSTON FIVE CENTS SAVINGS BANK-FHA LOAN:

MR. B.C. TYNER, AUTHORIZED CERTIFYING OFFICER, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD), HAS REQUESTED OUR ADVICE CONCERNING THE PROPRIETY OF HIS CERTIFYING FOR PAYMENT A VOUCHER IN THE AMOUNT OF $4,121.38 PAYABLE TO THE BOSTON FIVE CENTS SAVINGS BANK OF BOSTON, MASSACHUSETTS, FOR REIMBURSEMENT OF A LOSS SUSTAINED ON A PROPERTY IMPROVEMENT LOAN THAT WAS MADE TO JAMES AND MYRA RODRIGUES. THE LOAN WAS SUBMITTED TO HUD FOR INSURANCE PURSUANT TO TITLE I OF THE NATIONAL HOUSING ACT, AS AMENDED, 12 U.S.C. 1701 ET SEQ. THE BANK'S CLAIM WAS INITIALLY DENIED BY HUD BECAUSE THE TERM OF THE NOTE AS EXTENDED BY A SUBSEQUENT AGREEMENT BETWEEN THE BANK AND THE BORROWER, EXCEEDED THE 7 YEAR 32-DAY MAXIMUM STATUTORY TERM FOR SUCH LOANS WHICH WAS IN EFFECT WHEN THE LOAN WAS MADE.

THE PERTINENT FACTS AND CIRCUMSTANCES CONCERNING THIS MATTER AS DISCLOSED IN THE CERTIFYING OFFICER'S LETTER ARE SET FORTH BELOW.

THE NOTE IN QUESTION IS DATED NOVEMBER 1, 1973, AND PROVIDES FOR 84 MONTHLY INSTALLMENTS BEGINNING ON DECEMBER 15, 1973. UNDER THIS REPAYMENT SCHEDULE THE NOTE WOULD HAVE HAD A TERM OF 7 YEARS AND 14 DAYS, WITH FINAL PAYMENT BECOMING DUE ON NOVEMBER 15, 1980. HOWEVER, PURSUANT TO A REQUEST FROM THE BORROWER WHO HAD MISSED A MONTHLY PAYMENT, THE BANK, BY WRITTEN AGREEMENT DATED JANUARY 31, 1975, EXTENDED THE MATURITY DATE OF THE LOAN ONE MONTH FROM NOVEMBER 15, 1980, TO DECEMBER 15, 1980, THEREBY EXTENDING THE TERM OF THE NOTE TO 7 YEARS AND 44 DAYS. THE AGREEMENT ALSO PROVIDED THAT THE BORROWER WOULD PAY ADDITIONAL INTERST BY REASON OF THIS EXTENSION.

AT THE TIME THE LOAN WAS MADE, SECTION 2(B) OF THE NATIONAL HOUSING ACT, AS AMENDED, 12 U.S.C. 1703(B) (1970) READ IN PERTINENT PART AS FOLLOWS:

"NO INSURANCE SHALL BE GRANTED UNDER THIS SECTION TO ANY SUCH FINANCIAL INSTITUTION WITH RESPECT TO ANY OBLIGATION REPRESENTING ANY SUCH LOAN * * * (2) IF SUCH OBLIGATION HAS A MATURITY IN EXCESS OF THREE YEARS AND THIRTY-TWO DAYS,

EXCEPT THAT THE COMMISSIONER MAY INCREASE SUCH MAXIMUM LIMITATIONS TO SEVEN YEARS AND THIRTY-TWO DAYS IF HE DETERMINES SUCH INCREASE TO BE IN THE PUBLIC INTEREST * * * PROVIDED FURTHER, THAT ANY OBLIGATION WITH RESPECT TO WHICH INSURANCE IS GRANTED UNDER THIS SECTION ON OR AFTER JULY 1, 1939, MAY BE REFINANCED AND EXTENDED IN ACCORDANCE WITH SUCH TERMS AND CONDITIONS AS THE SECRETARY MAY PRESCRIBE, BUT IN NO EVENT FOR AN ADDITIONAL AMOUNT OR TERM IN EXCESS OF THE MAXIMUM PROVIDED FOR IN THIS SUBSECTION."

AS AUTHORIZED UNDER THIS SECTION, THE COMMISSIONER DID IN FACT INCREASE THE MAXIMUM MATURITY FOR NOTES OF THIS TYPE TO 7 YEARS AND 32 DAYS. SEE 24 C.F.R. 201.2(D)(2)(I) (1974).

SINCE THE TERM OF THE NOTE AS EXTENDED BY THE AGREEMENT OF JANUARY 31, 1975, EXCEEDED THE MAXIMUM MATURITY PRESCRIBED BY STATUTE AT THE TIME THE LOAN WAS MADE, HUD DENIED THE BANK'S CLAIM. SUBSEQUENTLY, BY LETTER DATED OCTOBER 28, 1976, THE BANK REQUESTED RECONSIDERATION OF THIS RULING, STATING IN PERTINENT PART AS FOLLOWS:

"WE HAVE BEEN GRANTING TITLE I LOANS FOR TEN YEARS AND IN THAT TIME PERIOD HAVE HAD LESS THAN A HANDFUL OF CLAIMS AS YOU WILL NOTE FROM OUR RECORD. DIFFICULT DELINQUENCY PROBLEMS HAVE ALWAYS BEEN HANDLED BY SHOWING DUE DILIGENCE AND FORBEARANCE IN THE COLLECTION OF OUR ACCOUNTS.

"WE HAD BEEN ADVISED BY THE LOCAL FHA OFFICE VIA TELEPHONE THAT AN EXTENSION PAYMENT WAS PERMISSIBLE AND ALSO ADVISED HOW TO COMPUTE THE CHARGE THAT REPRESENTS THE INTEREST PAYMENT FOR THE PARTICULAR MONTH IN QUESTION.

"IT IS OUR CONTENTION THAT HAVING UNKNOWINGLY VIOLATED A REGULATION AND CONSIDERING THE FACT THAT THE CONTRACT DOES NOT EXPIRE UNTIL 12/15/80, WE SHOULD BE ALLOWED TO DO ONE OF THE FOLLOWING:

(1) RESCIND THE EXTENSION AGREEMENT AND RESUBMIT THE CLAIM.

(2) RESUBMIT THE CLAIM AND HAVE HUD CONSIDER THE EXTENSION CHARGE AS A PARTIAL PAYMENT AND FIGURE THE CLAIM ON THE REMAINING BALANCE."

FOR THE REASONS SET FORTH HEREAFTER WE AGREE WITH HUD'S DECISION TO DENY THE INSTANT CLAIM.

THE BANK CONTENDS THAT IT SHOULD BE ALLOWED TO RESCIND THE EXTENSION AGREEMENT AND RESUBMIT THE CLAIM SINCE IT UNKNOWINGLY VIOLATED THE REGULATION LIMITING THE TERM OF THE NOTE. THE LIMITATION ON THE TERM OF THE TYPE OF LOAN ARISES, HOWEVER, BY REASONS OF A STATUTORY RATHER THAN REGULATORY PROVISION. ALTHOUGH SECTION 2(E) OF TITLE I OF THE NATIONAL HOUSING ACT, AS AMENDED, 12 U.S.C. 1703(E), AUTHORIZES THE SECRETARY OF HUD TO WAIVE COMPLIANCE WITH REGULATIONS PRESCRIBED BY HIM, NEITHER THAT SECTION NOR ANY OTHER PART OF THE ACT VESTS THE SECRETARY WITH AUTHORITY TO WAIVE COMPLIANCE WITH A REQUIREMENT. OUR OFFICE HAS CONSISTENTLY HELD THAT A LENDING INSTITUTION MAY EXTEND THE TIME FOR PAYING A NOTE BEYOND THE MAXIMUM TIME LIMITATION ONLY IF IT REFINANCES THE LOAN; THAT IS, IF A NEW NOTE IS EXECUTED. SEE B-131963, JULY 17, 1957; B-148816, MAY 21, 1962; B-149800, SEPTEMBER 28, 1962; B-164118, NOVEMBER 19, 1969; AND OTHER CASES CITED IN THOSE DECISIONS. IN THE INSTANT CASE IT IS CLEAR THAT THE AGREEMENT OF JANUARY 31, 1975, QUOTED IN PART BELOW, CONSTITUTED AN EXTENSION RATHER THAN A REFINANCING OF THE ORIGINAL NOTE. AS A RESULT, THE MATURITY DATE OF THE NOTE WAS EXTENDED BEYOND THE MAXIMUM AUTHORIZED BY STATUTE AT THE TIME THE LOAN WAS MADE.

WE RECOGNIZE THAT 12 U.S.C. 1703(B) WAS AMENDED BY THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974, APPROVED AUGUST 17, 1974, PUB. L. NO. 93-383, 88 STAT. 633, TO EXTEND THE MAXIMUM TERM ON LOANS OF THIS TYPE FROM 7 YEARS AND 32 DAYS TO 12 YEARS AND 32 DAYS. HOWEVER, THE RIGHTS AND OBLIGATIONS OF THE INSURED ARE FIXED AS OF THE DATE OF THE ORIGINAL LOAN OBLIGATION. ACCORDINGLY, SINCE THE ORIGINAL NOTE WAS EXTENDED AND A NEW NOTE WAS NOT EXECUTED, THE 7-YEAR 32- DAY STATUTORY LIMITATION IN EFFECT WHEN THE LOAN WAS MADE AND THE NOTE SIGNED IS CONTROLLING.

WITH RESPECT TO THE BANK'S CONTENTION THAT IT SHOULD BE ALLOWED TO RESCIND THE EXTENSION AGREEMENT AND RESUBMIT THE CLAIM, SIMILAR ARGUMENTS HAVE BEEN CONSIDERED AND REJECTED BY OUR OFFICE IN THE PAST. IN B-164118, DECEMBER 30, 1969, AND B-164118, AUGUST 14, 1968, OUR OFFICE WAS PRESENTED WITH THE ARGUMENT THAT THE EXTENSION AGREEMENTS INVOLVED IN THOSE CASES, WHICH APPEARED TO BE CLEAR AND UNAMBIGUOUS, SHOULD IN EFFECT BE MODIFIED OR REFORMED TO REFLECT WHAT THE BANKS SAID WAS ACTUALLY INTENDED WHEN THE EXTENSIONS WERE AGREED TO; NAMELY, THAT CERTAIN PAYMENTS WERE TO BE DEFERRED WITHOUT EXTENDING THE FINAL MATURITY DATE OF THE NOTE BEYOND THE MAXIMUM STATUTORY TERM. OUR OFFICE REJECTED THAT ARGUMENT IN THOSE CASES SINCE THE EXTENSION AGREEMENTS INVOLVED IN BOTH CASES WERE NOT AMBIGUOUS AND NEITHER BANK PRESENTED CLEAR PROOF THAT A MISTAKE IN CALCULATING THE DUE DATE OF THE FINAL PAYMENT HAD BEEN MADE IN THE EXECUTION OF THOSE AGREEMENTS.

SIMILARLY, IN THE INSTANT CASE THE AGREEMENT EXPRESSLY STATES THAT:

" * * * THIS ARRANGEMENT WILL EXTEND YOUR NOTE ONE MONTHS) AND IN NO WAY WILL AFFECT THE OTHER TERMS OF YOUR NOTE. THE NEW EXPIRATION DATE OF YOUR CONTRACT WILL BE DECEMBER 15, 1980."

THE LANGUAGE OF THIS AGREEMENT IS CLEAR AND UNAMBIGUOUS AND THE BANK HAS NOT SHOWN ANY ERROR IN ITS COMPUTATIONS IN ESTABLISHING THE LOAN'S NEW DUE DATE OF DECEMBER 15, 1980. HENCE, IN OUR VIEW, NO BASIS HAS BEEN PRESENTED THAT WOULD JUSTIFY RESCISSION OF THE AGREEMENT.

FINALLY, THE BANK ALSO CONTENDS THAT IT WAS ADVISED VIA TELEPHONE BY THE LOCAL OFFICE OF THE FEDERAL HOUSING ADMINISTRATION (FHA) THAT AN "EXTENSION PAYMENT" WAS PERMISSIBLE. IF BY THIS THE BANK MEANS TO SAY THAT IT WAS SPECIFICALLY ADVISED BY AN FHA EMPLOYEE THAT THE INSTANT LOAN COULD BE EXTENDED AN ADDITIONAL MONTH WITHOUT VIOLATING THE STATUTORY PROHIBITION, AND EVEN IF IT COULD SUBSTANTIATE THIS CONTENTION, WE WOULD STILL HAVE TO REJECT THE BANK'S CLAIM. IT HAS LONG BEEN RECOGNIZED THAT " * * * THE UNITED STATES IS NEITHER BOUND NOR ESTOPPED BY ACTS OF ITS OFFICERS OR AGENTS IN ENTERING INTO AN ARRANGEMENT OR AGREEMENT TO DO OR CAUSE TO BE DONE WHAT THE LAW DOES NOT SANCTION OR PERMIT * * * ." SEE UTAH POWER AND LIGHT CO. V. UNITED STATES, 243 U.S. 389, 409 (1917).

FURTHERMORE, IN INTERPRETING THE SPECIFIC STATUTE INVOLVED HERE, OUR OFFICE HAS ALWAYS HELD THAT "SINCE NEITHER THE ACT NOR THE REGULATIONS REQUIRE THAT THE GOVERNMENT DETERMINE WHETHER A LOAN IS INSURABLE BEFORE THE GOVERNMENT WILL ACCEPT INSURANCE CHARGES PAID THEREON, THE LENDING INSTITUTION THAT APPLIES TO HUD FOR INSURANCE * * * BEARS THE BASIC RESPONSIBILITY FOR DETERMINING THAT * * * (THE NOTE) DOES NOT HAVE A MATURITY IN EXCESS OF THAT PERMITTED BY THE NATIONAL HOUSING ACT." SEE 55 COMP.GEN.126 (1975) AND B-172121, APRIL 12, 1971. THE LENDER MUST BEAR THE SAME RESPONSIBILITY FOR DETERMINING THAT A SUBSEQUENT EXTENSION THEREOF DOES NOT EXCEED THE STATUTORY MAXIMUM.

IN ACCORDANCE WITH THE FOREGOING IT IS OUR CONCLUSION THAT THE VOUCHER IN QUESTION CANNOT BE CERTIFIED FOR PAYMENT. THE VOUCHER, TOGETHER WITH THE CASE FILE, IS BEING RETURNED TO THE AUTHORIZED CERTIFYING OFFICE WHO SUBMITTED SAME.